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in the

Supreme Court

of the

United States

October Term, 1980

THE STATE OF FLORIDA,
Petitioner,

vs.

BURR WILLIAM STUART,
Respondent.

On Petition for Writ of Certiorari To the District Court of Appeal of Florida, Third District

BRIEF OF PETITIONER ON JURISDICTION

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QUESTION PRESENTED

WHETHER THE DECISION OF THE FLORIDA COURTS, CONSTRUING THE FOURTH AMENDMENT AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, HOLDING: 1) THAT THE MERE APPROACH OF A POLICE OFFICER IS A DETENTION/STOP; 2) THAT THE FACTS HEREIN CONSTITUTE A STOP; 3) THAT ALL SO-CALLED "PROFILE" TRANSACTIONS ARE ILLEGAL NO MATTER WHAT THE FACTS ARE UNDER *REID V. GEORGIA*, ____ U.S. ____, 100 S.CT. 2752 (1980) AND 4) THAT THE CONSENT AND SEARCH HEREIN WAS THEREFORE ILLEGAL, IS IN DIRECT AND SUBSTANTIAL CONFLICT WITH THE RULE OF THIS COURT IN *UNITED STATES V. MENDENHALL*, ____ U.S. ____, 100 S.CT. 1870 (1980); *SCHENCKLOTH V. BUSTAMONTE*, 412 U.S. 218 (1973) AND *TERRY V. OHIO*, 392 U.S. 1 (1968)?

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PREFACE

The Petitioner, THE STATE OF FLORIDA, was the Appellant in the District Court of Appeal of Florida, Third District, and the prosecution in the Florida trial court. The Respondent, BURR WILLIAM STUART, was the Appellee in the Florida District Court and the defendant in the Florida trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following reference is made in this brief.

(A) For the portions of the record below sufficient to show jurisdiction in this court, which are contained in the Petitioner's Appendix and consist of page A1-A83.

I

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, reversing the Florida trial court's denial of the Defendant's Motion to Suppress, is reported at *Stuart v. State*, 389 So.2d 4 (Fla. 3d DCA 1980). The opinion of the Florida District Court is also contained in the State's Appendix at A71-A72. There is no official reporter for citation to this opinion.

II

JURISDICTION

On November 5, 1980, the District Court of Appeal of Florida, Third District, denied the State's timely Petition for Rehearing. A82. The State of Florida by timely Motion obtained an extension of time (per Justice Powell) in which to submit its Petition for Certiorari herein. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257(3) and Amendments IV and XIV of the United States Constitution.

The interpretation of the Florida Constitution and the United States Constitution are identical for purposes of the application of the criminal law and search and seizure issues. *Hetland v. State*, 366 So.2d 831 (Fla. 2d DCA 1979), *approved and adopted*, *Hetland v. State*, 387 So.2d 963 (Fla. 1980). The Florida District Court *per curiam* opinion, makes the Florida District Court the Court of last resort herein as a matter of law. *Dodi Publishing Co. v. Editorial America* S.A., 385 So.2d 1369 (Fla. 1980); *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980); *see, St. Paul Title Insurance Co. v. Davis*, _ So.2d _ (Fla. 1980), Fla.S.Ct. Case No. 59,245, opinion filed November 13, 1980.[1]

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[1]The State filed a petition for review herein in the Florida Supreme Court, which the Florida Supreme Court dismissed upon a Suggestion of Dismissal. *See*, A84-A87.

III

CONSTITUTION AND STATUTORY PROVISIONS

Amendment IV of the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the Constitution of the United States provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

IV

STATEMENT OF THE CASE

The Appellant, Burr W. Stuart, was charged by information with three counts consisting of unlawful possession of cocaine with intent to sell; battery upon a law enforcement officer and resisting arrest with violence arising out of his attempt on July 25, 1978 to transport cocaine in a body carry through Miami International Airport. At the hearing upon the motion to suppress herein, the Appellee produced two (2) witnesses Detective Charles McGhee and by deposition, Detective Michael Magdelena of the Dade County Public Safety Department airport narcotics organized crime bureau. *See*, A4; A59. Detective McGhee testified generally as to his extensive narcotics arrests and experience. *See*, A5-A7. He testified that on July 25, 1978, he was working in plain civilian clothes with Detective Magdelena at the Miami International Airport at about 6:30 p.m., when he observed the Defendant arriving at the terminal in a taxi. A8-A11. The Defendant was carrying an empty foldover luggage bag and appeared to Detective McGhee to be anxious and nervous. A11-A12. Detective McGhee ascertained that the Defendant had been in Miami less than twenty-four (24) hours and was going back to Houston, Texas in a few minutes. A15; A16; A18. Detective McGhee testified that in his experience, Houston is a narcotics transportation center. A9-A10. The appearance, actions and demeanor of the Defendant were significant to Detectives McGhee and Magdelena in their training and experience. *See*, A10-A18.

As the Defendant proceeded to the departure gate, Detective McGhee decided to approach the Defendant. A18. McGhee and Magdelena both testified that if a person they approach refuses to talk with them, he just gets on the plane and leaves. A58. Initially, as Detective McGhee approached the Defendant, the Defendant turned; achieved eye-contact with McGhee and then sprinted forward a few steps. A19. McGhee said to the Defendant "Sir, may I talk to you a few moments?" A19. When the Defendant responded and turned toward him, Detective McGhee said, "I would like to talk to you — would you have any objection?" A19. McGhee testified that the Defendant replied, "No," and then said, "What's this all about." A19-A20. McGhee then testified that:

> "At that time, I advised him — he asked what it was all about. I advised him we worked at the airport as police officers. I told him that our job was to look for things that would seem to be characteristic of people carrying contraband. I told him that our job was to see things that normally wouldn't — to see things that we probably wouldn't pay attention to.
>
> "I told him we would like to ask him a few questions. We asked him if he had any objections. He said, "No."
>
> A20.

McGhee specifically told the Defendant that he was free to go and that they wanted to talk only with his consent. See, A48; A22.

McGhee said that they *asked* the Defendant for identification and he produced his driver's license and also handed the detectives his airline ticket. A23. *After a minute, the license and ticket were returned to the Defendant.* A24. McGhee testified that the Defendant was extremely nervous and jerky and his speech became slurred and he stuttered. A26. McGhee said that the Defendant's shirt became saturated with perspiration. A26. After a brief conversation, McGhee asked the Defendant if he had any objection if they looked in the bag that the Defendant was carrying. A26. The Defendant said, "sure," and handed the bag to McGhee and said, "sure, you can look." A26. McGhee testified that the bag was empty except for one (1) T-shirt and one (1) pair of dungarees. A27. The bag had no toiletries or shaving gear. A27. McGhee then testified that:

> "Upon returning his bag to him, he dropped it off to the side. I stood up and said, "I'm not trying to hassle you or anything, but the things I have told you of people's characteristics carrying narcotics is similar to things you have displayed to us." I told him I would like his consent to pat him down and I asked if he had any objection. At that point, he threw his arms up in the air and with his arms spread, he said, "Sure. I haven't anything to hide. I haven't got anything."
>
> A28.

Detective McGhee, based upon his experience patted down the Defendant's torso; small of the back; and both legs and feet. *See*, A28. As Detective McGhee began examining the Defendant's right leg, the Defendant began quivering so much that his foot tapped the floor and Detective McGhee at that point, felt a lump in the Defendant's boot, which was malleable and powderlike, "crinkled" and was wrapped in plastic. A28. McGhee said that the Defendant was very nervous and appeared about to "break and run." A31.

Detective McGhee stood up; asked the Defendant what the substance was and the Defendant stuttered and said, "that's my money" and McGhee asked if he could see it. A31. Detective McGhee testified that in his experience the substance was a narcotic, probably cocaine and he told the Defendant that the substance certainly was not money. A32. The Defendant refused to permit examination of the lump. A31. Thereupon, the Defendant was given a *Miranda* warning to which he responded that he understood. A32. The Defendant and the detectives then moved a few feet to a locker area where McGhee began a second pat down. A33. Detective McGhee said that he wanted to pat the Defendant down because there were several hundred people and himself because of the Defendant's strange behavior and hyper condition. A34; A55. He said the Defendant was shaking so hard he was vibrating all over. Similarly, on cross-examination, Detective McGhee indicated that the reason that they identify themselves to drug couriers is to avoid defendants thinking that there is about to be a drug rip-off (and becoming violent). *See*, A51.

When Detective McGhee again reached for the Defendant's right boot, the Defendant kicked him and a violent struggle ensued. A34. At that point, Detective McGhee told the Defendant you're under arrest. A34. As Detective Magdelena put on one handcuff, the Defendant again struggled to break free and run, punching with his elbows. A35. The Defendant was finally subdued after a second struggle. A35. After arrest of the Defendant for the battery, and a search pursuant to his arrest, the substance in the right boot was ascertained to be cocaine in a plastic bag. A35; A36. The prosecutor indicated below that the testimony of Detective Magdelena would be cumulative; thereupon the parties stipulated the prior deposition of Detective Magdelena into evidence. A59. The defendant's testimony consisted of denials of the testimony of the officers or that he didn't remember. McGhee also testified briefly on rebuttal.

Upon these facts, the State vigorously argued, 1) the right of the police officers to approach anyone in a public area and engage them in conversation; 2) that the officers acquired articulable suspicion and or probable cause to search the bulge of cocaine during a consensual transaction with the Defendant and 3) that the body carry of cocaine was lawfully searched pursuant to the Defendant's lawful arrest for battery upon a police officer. *See* A60-A64. The Defendant argued that the entire transaction was a "profile" *stop* and that the Defendant's statement that he didn't consent should prevail. A64-A69.

Upon the foregoing facts, and argument, the Florida trial court below denied the Defendant's Motion to Suppress and Motion to Dismiss the battery charges.

A68. The view of the trial court, was it must upon this record make findings of fact as to who to believe. A64. The trial court found that the initial "stop" herein was nothing more than a voluntary contact between a citizen on the street and police officers in a position that they had a right to be. A67. The court held that the more credible testimony reveals that the Defendant consented to the initial conversation and then to the first pat down, which revealed the bulge in the Defendant's foot. A68. The Court held that the more credible evidence revealed that the defendant was highly agitated and his behavior was unusual and that the substance in his boot was in fact contraband narcotics — cocaine. *See*, A67-A68. The Court held that the officers had, *"suspicion which arose justifiably,"* that the bulge was narcotics. A68. More importantly however, before the bulge was examined the second time, the Florida trial court held as a matter of fact that the Defendant began "the fracas and caused the fight." A68. The trial court explained its holding thus:

> "THE COURT: I understand. I really think it is a factual finding. I am going to have to make a factual finding.
>
> I find the initial stop would not be justified under any profile. The initial stop in conversation in fact is justified based on the rights of a police officer to stop and talk to anybody he wishes.
>
> They are not obligated to talk to them. In my mind, the more credible evidence supports that

the initial conversation with the defendant was in fact one where the defendant consented to talk to the officers. Thereafter, consent to allow them to go through his luggage and to search him — [*Court Reporter's omission*] I am not convinced that it is true for the purpose of this hearing. I find it to be more credible that the defendant is carrying a considerable amount of cocaine in his boot. I find it hard to believe he would not be nervous. I think the officer's testimony concerning the agitated state of the defendant sounds more credible under the circumstances.

I have not finished. I will give you a chance. I find it to be more credible when they began to search him they were unable to get to his boot. At that point, they moved him off to the side. I accept the version of the evidence that says when they got to search him again and they had a right to at that time because there was suspicion which arose justifiably. At that point, when they began to search him and the struggle ensued, it was the defendant who began the fracas and caused the fight.

THE COURT: That is the way I feel, sir.

MR. COHN: Judge, the question is how the suspicion was aroused.

THE COURT: He consented to the bag and became agitated and nervous. When they searched his body, he became more agitated and —

MR. COHN: Why was their suspicion aroused?

THE COURT: From that point, it is downhill. Up to that time, it is downhill. They had no right to search merely because he was within the characteristics of the DEA profile.

MR. COHN: I do not think the State has met its burden.

THE COURT: Mr. Cohn, I do. I feel that the State has shown a consent. It is not true in all cases, but it is more believable in this case. Somebody has to make a decision on who to believe.

MR. COHN: Why burden the defendant with this appeal?

THE COURT: The State pays me a lot of money to make decisions. It does not mean it is in favor of the State but I have to.

I will find in favor of the State. I will deny the motion to suppress."

A67-A69.

Thereupon, the Defendant subsequently pleaded nolo contendere and appealed to the Third District Court of Appeal of Florida. *See*, A70; *see also, Brown v. State*, 376 So.2d 382 (Fla. 1979).

On appeal to the District Court of Appeal of Florida, for the Third District, the District Court reversed the

trial court holding that the mere approach of the officers was a stop, *State v. Frost*, 374 So.2d 593 (Fla. 3d DCA 1979) (Schwartz, J.) and that all so-called "profile" stops are unconstitutional no matter what the observed facts are, *Royer v. State*, 389 So.2d 1008 (Fla. 3d DCA 1980) (Schwartz, J.). The Florida District Courts opinion states only in a summary fashion thus:

> "PER CURIAM.
>
> "The appellant's judgment of conviction is reversed with directions to discharge him from custody. Because of the reasons and authorities stated in *Royer v. State*, 389 So.2d 1008 (Fla. 3d DCA 1980) (Case No. 78-1050, opinion filed September 9, 1980) (en banc) and *State v. Frost*, 374 So.2d 593 (Fla. 3d DCA 1979), we find the trial court erroneously denied appellant's motion to suppress the physical evidence."
>
> A71-A72.

The State filed an extensive Petition for Rehearing, which was summarily denied. A73-A82.

V

SUMMARY OF ARGUMENT

The decision of the Florida District Court, construing the Fourth Amendment of the United States Constitution holding: 1) That the mere approach of a police officer is a detention/stop; 2) that the facts herein constitute a stop; 3) that all so-called "profile" transactions are illegal no matter what the facts are under *Reid v. Georgia*, ___ U.S. ___, 100 S.Ct. 2752 (1980) and 4) that the consent and search herein were therefore illegal, is in direct and substantial conflict with the rule of this court in *United States v. Mendenhall*, ___, U.S. ___, 100 S.Ct. 1870 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) and *Terry v. Ohio*, 392 U.S. 1 (1968). In view of this Court's recent decision in *Mendenhall* and *Reid v. Georgia*, ___ U.S. _, 100 S.Ct. 2752 (1980) leaving the present issues in a state of some confusion, this Honorable Court should correct this patent misconstruction of the United States Constitution. The exclusionary rule should not be applied in the circumstances of the case at bar, where the officers acted in good faith and the application of the exclusionary rule serves no purpose except to frustrate the lawful interdiction of chronic narcotics traffic. *See, United States v. Williams*, 622 F.2d 80 (5th Cir. 1980), *en banc.*

VI

ARGUMENT

The decision of the Florida Courts cannot be reconciled with the decisions of this Court in *United States v. Mendenhall*, ___ U.S. ___, 100 S.Ct. 1870 (1980); *Terry v. Ohio*, 392 U.S. 1 (1968); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *United States v. Robinson*, 414 U.S. 218 (1973) and *Adams v. Williams*, 407 U.S. 143 (1972). The State submits first of all, that in the circumstances of the case at bar, the initial transaction herein was not prohibited by the Fourth and Fourteenth Amendments but was a mere "contact" between a police officer in a position that he had a right to be in and a citizen on the street. *Terry v. Ohio; United States v. Mendenhall. Secondly*, the Defendant's extraordinary demeanor, coupled with his denial of the obvious content of the body carry of cocaine, which was discovered pursuant to a consensual pat down, provided the officers with reasonable and articulable suspicion for a further investigation. *See, Adams v. Williams*, 407 U.S. 143 at 145-146 (1972). When the Defendant resisted a second examination and battered the officers, the body carry of cocaine was clearly lawfully recovered as incident to his arrrest. *United States v. Robinson*, 414 U.S. 218 (1973). In the controlling decisions herein in *Royer v. State*, 389 So.2d 1007 (Fla. 3d DCA 1980) (Schwartz, J.) (*reversing reported panel opinion en banc*) and *State v. Frost*, 374 So.2d 593 (Fla. 3d DCA 1979) (Schwartz, J.) the Florida Third District Court of Appeal has rejected the mandate of *Terry, Mendenhall, Schneckloth*, and *Adams v. Williams*, in the airport context, in favor of what it erroneously perceives as the ruling of this Court in *Reid v. Georgia*, _ U.S. _, 100

S.Ct. 2752 (1980) and gives force of law to a previous *"attraction"* to the concept that *any* approach by a police officer is a "stop." *See, Frost,* 374 So.2d at 597-598; *Royer,* 389 So.2d at 1019. Under the guise of *Royer,* and *Reid* the Florida Third District Court of Appeal has embarked upon a course of wholesale reversals of Florida trial court findings of consent and articulable suspicion in the airport context. *See, Correa v. State,* 389 So.2d 1204 (Fla. 3d DCA 1980) (*reversed upon rehearing subsequent to Royer assuming that the mere approach of a police officer is a "show of authority"*); *Stuart v. State,* 389 So.2d 4 (Fla. 3d DCA 1980) (*'reversed see Royer* and *Frost'); Harrison v. State,* 389 So.2d 293 (Fla. 3d DCA 1980) (*'reversed see Royer and Reid'*); *Major v. State,* 389 So.2d 1203 (Fla. 3d DCA 1980) (Schwartz, J.) (*reversed on rehearing after Royer even though the Defendant signed a written consent form and was advised of a right to refuse consent*); *Monohan v. State,* 390 So.2d 756 (Fla. 3d DCA 1980) (*assuming after Royer that the approach of narcotics officers in an airport is a "stop" per se*); *Cimino v. State,* 390 So.2d 795 (Fla. 3d DCA 1980) (*'reversed see Reid and Royer'*). As in the case at bar, the Florida Third District controls the substantive law in airport cases, located as it is, in Miami, Florida, the nation's most chronic drug courier terminal.[2] Furthermore, as in the case at bar, where

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[2]Just during the eighteen (18) month period from October 1, 1977, through May 31, 1979. the Miami International Airport unit *identified* three hundred and eighty-six (386) narcotics couriers and seized thirty (30) pounds of quaaludes; four hundred and thirty (430) pounds of cocaine and fifteen thousand (15,000) *pounds* of marijuana *just* being transported through Miami International Airport in suitcases, briefcases, and in bodycarrys. A83. During an eight (8) month period preceding May 31, 1979, the Airport Narcotics Unit also seized twenty-four (24) pounds of heroin. Seizures of cocaine and marijuana in South Florida set national records for

the State has no other of avenue for review, this Honorable Court should take jurisdiction and overturn the Third District Court of Appeal.

In the case at bar, there is no testimony, but that the officers merely approached and contacted a citizen on the street. Under *Terry v. Ohio, supra*, and its progeny, a police officer may approach a citizen for three separate reasons: 1) arrest; 2) stop and investigation and 3) mere contact. *See, e.g., United States v. Wylie*, 569 F.2d 62 (D.C. Cir. 1977); *Carpenter v. Sigler*, 419 F.2d 169 (8th Cir. 1969); *Wilson v. Porter*, 361 F.2d 412 (9th Cir. 1966); *see also, United States v. Mendenhall*. The predicate for each of these categories is different; as are the consequences. In order to justify an arrest, there must exist probable cause to believe that a crime has been committed and that the defendant committed it. In order to justify a *stop and detention*, the police must be able to articulate an objective, reasonable basis for belief that a crime has been, will be, or is currently being committed. *Terry v. Ohio, supra*. Such a stop gives the police the power to detain a citizen against his will for the limited purpose of investigation. The third form of approach, a mere *contact*, is directly applicable in the case at bar, and consists of simple common sense. *See, Terry v. Ohio; United States v. Mendenhall; United States v. Wylie*. In a mere *contact* the officer may not detain a citizen at all. He has only a common right to engage in voluntary conversation and if the citizen does not wish to respond, he need not, and

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(Footnote 2 continued)

frequency and quantity. These figures dwarf the seizures before this Court in *Mendenhall*. *See, United States v. Mendenhall*, 596 F.2d 706, at 708, n. 1 (6th Cir. 1979), Weick, J. *dissenting*.

may simply walk away. *See, e.g., United States v. Wylie*, at 67. This natural, common sense conclusion is predicated upon the fact that ordinary threshold discourse between police officers and citizens on the street is not cause for constitutional alarm. *Terry v. Ohio, United States v. Mendenhall.*

In *Terry v. Ohio*, the court, through Justice Warren, stated the applicable standards herein thus:

> "It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusion short of arrest."
>
> Id. at 26.

The court in *Terry* recognized that for the purpose of the Fourth Amendment, an "arrest and search" and a "stop" are to be considered "seizures." However, the court recognized that:

> "[N]ot all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the Officer, by means of physical force or show of authority has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred."
>
> Id. at 19, n. 16.

Mr. Justice Harlan in his concurring opinion specifically recognized that the right of a police officer to address questions to other persons is a right possessed by

every citizen, co-existing with the *equal* right of the person addressed to ignore his interrogator and walk away. 392 U.S., *supra*, at 32, 33. Further, in the concurring opinion of Mr. Justice White, it is stated:

> "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets."

More recently in *United States v. Mendenhall*, the court recites preliminary facts virtually identical to those herein as *not tantamount to a seizure:*

> *"We adhere to the view that a person is "seized" only when by means of physical force of a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards.* The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerte, 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116.
>
> "On the facts of this case, no "seizure" of the respondent occurred. [1] The events took place in the public concourse. [2] The agents wore no uniforms and displayed no weapons. [3] They did not summon the respondent to their presence, [4] but instead approached her and identified themselves as federal agents. [5] They requested, but did not demand to see the respondent's identification and ticket. *Such conduct without more, did not amount to an*

intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket, and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official. See Terry v. Ohio, supra, 392 U.S., at 31, 32-33, 88 S.Ct., at 1885-1885 (Harlan, J., concurring). See also A.L.I., Model Code of Pre-Arraignment Procedure §110.1(1) and commentary at 257-261. In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agent's initial approach to her was not a seizure.

"Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses do not depend upon her having been so informed. See Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854. *We also reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agent's questions.* It may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily.

> "*The Court's decision last Term in Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357, *on which the respondent relies, is not apposite.* It could not have been plainer under the circumstances there presented that Brown was forcibly detained by the officers. *In that case, two police officers approached Brown in an alley, and asked him to identify himself and to explain his reason for being there. Brown "refused to identify himself and angrily asserted that the officers had no right to stop him,"* Id., at 49, 99 S.Ct., at 2639. *UP TO THIS POINT THERE WAS NO SEIZURE.* But after continuing to protest, the officer's power to interrogate him, Brown was first frisked, and then arrested for violation of a state statute making it a criminal offense for a person to refuse to give his name and address to an officer 'who has lawfully stopped him and requested the information.' " [Emphasis added].
>
> 100 S.Ct. at 1877-1878.

In the case at bar, consistent with the mandate of *Terry v. Ohio*, and *United States v. Mendenhall*, the trial court affirmatively found that the Defendant had voluntarily consented both to speak with the officers and to the initial pat down which revealed the body carry of cocaine. A67-A69. Consent is a question of fact for the trier of fact to determine from the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). It is fundamental appellate error for any appellate court to intrude upon such a determination where the record contains evidence to support such a

determination. In *United States v. Mendenhall*, this court succinctly explained that:

> "Although we have concluded that the initial encounter between the DEA agents and the respondent on the concourse at the Detroit airport did not constitute an unlawful seizure, it is still arguable that the respondent's Fourth Amendment protections were violated when she went from the concourse to the DEA office. Such a violation might in turn infect the subsequent search of the respondent's person.
>
> "The District Court specifically found that the respondent accompanied the agents to the office 'voluntarily in a spirit of apparent cooperation' quoting Sibron v. New York, 392 U.S. 40, 63, 88 S.Ct. 1889, 1903, 20 L.Ed.2d 917. Notwithstanding this determination by the trial court, *the Court of Appeals evidently concluded that the agent's request that the respondent accompany them converted the situation into an arrest requiring probable cause in order to be found lawful.* But because the trial court's finding was sustained by the record, *THE COURT OF APPEALS WAS MISTAKEN IN SUBSTITUTING FOR THAT FINDING ITS VIEW OF THE EVIDENCE.* See Jackson v. United States, 122 U.S. App. D.C. 324, 353 F.2d 862 (1965)."
>
> 100 S.Ct. at 1878.

See, also, State v. Nova, 361 So.2d 411 at 413 (Fla. 1978). In the case at bar *as in Mendenhall*, the events

herein 1) took place upon a public concourse; 2) the officers wore no uniforms and displayed no weapons; 3) the officers did not summon the defendant; 4) but instead the officers approached him and identified themselves; 5) requested but did not demand the Defendant's identification and ticket and 6) the officer's posed a few questions. These circumstances do *not* amount to a "stop" within the meaning of the United States Constitution. *Terry v. Ohio; United States v. Mendenhall; see also, United States v. Fry,* 622 F.2d 1218 (5th Cir. 1980); *United States v. Elmore,* 595 F.2d 1036 (5th Cir. 1979).

In *State v. Frost,* in a *state appeal,* the court *held* that because it was a state appeal, and the appellate record *failed to show* that the Appellant's license and airline ticket were *immediately* returned to the Appellant, the Court would *assume* the ticket and license were *not* immediately returned.[3] *See,* 374 So.2d at 595-596 at 598. The *Frost* court concluded that therefore *automatically,* a "stop" had been effected by the officers, despite the evidence to the contrary. *See,* 374 So.2d at 598; *contra, United States v. Elmore,* 595 F.2d 1036 (5th Cir. 1979) (*the momentary possession of the defendant's ticket is not a "stop"; the officers acquired articulable suspicion through the defendant's false identification prior to walking away the defendant's ticket*). The *Frost* court in its holding, further severely criticized the United States Fifth Circuit Court of Appeals in *Elmore,* for what the *Frost* court viewed, as *holding,* "that it makes a constitutional difference as to the

---

[3]This issue was neither presented nor argued by anyone in the trial court.

restraint of one's liberty whether an officer with a traveler's ticket in his hand remains face to face with the individual or walks away from him" *and holding*, "that the fruits of an unlawful search or seizure [can] retroactively serve to sustain it." *See*, 374 So.2d at 598, n. 4. The *Elmore* court, did neither of these things, but rather, approved the right of a police officer to approach anyone on the street and engage him in voluntary conversation. *Accord, e.g., Terry v. Ohio* and *Mendenhall.*

Apart from the apparent holding in *Frost* above and *central* to the *Frost* court's complaint about Elmore, is the dicta in *Frost*, wherein the *Frost* court opined that:

> "In applying these standards to airport searches like the one involved in this case, many courts have held that a Fourth Amendment stop occurs as soon as officers initially approach an individual, identify themselves, and begin to question him. [Citing] *United States v. Coleman*, 450 F.Supp. 433, 439 (E.D. Mich. 1978) . . ."

In the case at bar, it was undisputed that the Defendant's ticket and license were returned after only a momentary examination. Thus it is wholly apparent that the *"attraction"* in *Frost* is now given force of law in the case at bar. *See, also, Monohan v. State*, 390 So.2d at 757; *Correa v. State*, 389 So.2d 1205; *Cimino v. State, supra; Major v. State*, 389 So.2d at 1204. In *Monohan, Correa* and *Major* the Florida Third District Court assumes a constitutional *"stop"* and/or couches its analysis in terms of a constitutional *"submission to authority,"* where all that has occurred (*as in the case at bar*), is identification by the plain clothes narcotics officers

and their asking if the courier has a moment to talk and/or *asking* for consent. This analysis under the guise of this Court's opinion in *Reid v. Georgia*, is fundamentally erroneous and is causing the State of Florida grievous difficulty in the prosecution of narcotics couriers in the nation's most chronic narcotics traffic terminal.

In *Royer v. State*, the reported panel opinion *rejected* the *Frost* analysis above, 389 So.2d at 1011-1012, and adopted a view that observed facts, which happen to fit a "profile" were sufficient to provide articulable suspicion and/or eventual probable cause, 389 So.2d at 1014. In *Royer* the facts were identical to those in *Mendenhall*:

> "The facts leading up to the search and seizure of the marijuana were the following. Officers Johnson and Magdalena, of the Dade County Public Safety Department, were plainclothes detectives assigned to the County's Crime Bureau, Narcotics Investigation Section, performing duty at Miami International Airport as members of what was known as the Smuggling Detail, consisting of a sergeant, and eight officers, who worked in pairs, on shifts. Said officers had acquired knowledge of a "profile" by which it was possible with a substantial measure of certainty to recognize couriers or carriers of drugs in air travel. Such profile had been arrived at by experiences of narcotics officers with a great number of such persons in main drug distribution centers and the target city destination places.
>
> Miami was a known point from which imported drugs, including marijuana, were transported

to other target destination cities, one of which was New York City. It was known that commercial airlines were used for such transport of drugs by such couriers and others. On a certain day, at the Miami International Airport, the above-named officers observed the defendant as he was about to purchase a ticket on an airline. The defendant's appearance and mannerisms, his luggage and the way he dealt with it, and his means of obtaining his ticket, etc., as observed by the officers were such as to fit the profile, the details and nature of which we purposely do not here state. As disclosed through the testimony of Officer Johnson, the defendant was observed to fit the profile of a drug courier.

The defendant checked his two suitcases, placing identification labels thereon bearing the name "Holt", but without stating his address or telephone number in the spaces provided therefor on the labels. The officers noted the name which the defendant placed on the suitcases. As the defendant was proceeding to enter the concourse leading to the boarding area, after having obtained his ticket and checked his suitcases, the officers approached him, identified themselves as police officers, and asked him if he had time to talk with them, which he said he did. There followed a series of requests by the officers, to none of which the defendant objected, and to each of which the defendant assented. Those consisted of his initial consent to talk to the officers, his production upon request of his ticket (which

was to New York City), and his driver's license for identification (which showed his name on the ticket); his consent to move with them out of the main room into a vacant side room for further conversation; his consent to the officer's request that the suitcases be opened (after Johnson had retrieved the suitcases). When the officers requested his consent to the opening of the suitcases, the defendant produced a key from his pocket and unlocked one of the cases. He explained that he did not know the combination of the combination lock on the other suitcase, and upon request gave his consent to the opening of the other case by the officers, which they did with the aid of a screwdriver. The search revealed the suitcases contained 65 pounds of marijuana."

389 So.2d at 1008-1009.

The *panel opinion* affirmed the concept of a mere contact and consent, opining that:

"Here there was no coercive action by the officers. There was no use of force. They did not touch him, or display any weapon, or make any demands. There was no show of force other than the fact, as revealed to the defendant, that Johnson and Magdalena were police officers. The statement to the defendant by one of the officers, when requesting his consent to the opening of the suitcases, that they had reason to believe the cases contained drugs or contraband was not a threat, but rather an explanation of why they were requesting consent

> to search the cases. The requests which the officers made of the defendant were made politely, and the defendant so testified."
>
> Id. at 1010.

Upon rehearing, the *dissent* to the panel opinion authored the *en banc* reversal of both the previous panel and the trial court, holding that under *Frost, supra,* the defendant was *"arrested"* when he consented to go to the *"interrogation room."* 389 So.2d 1018-1019. Mirroring its previous dissenting opinion, the *en banc* opinion refers to the factual finding of consent by the trial court as, "THE ALLEGED CONSENT." Id at 1019. The new opinion also rejects the fact that the defendant gave an alias to the airlines as *inconsequential* and further *ridicules* the narcotics officer's observations as *"amateur psychiatry"* that should be *"completely disregarded." Id,* at 1016-1017; 1016, n. 4. The District Court, per Schwartz, J., then concluded that under *Reid v. Georgia,* all so called *"profile"* stops were illegal irrespective of what the *observed* facts are, and noted that *Mendenhall* is *"contra."* 389 So.2d at 1019, and 1017 n. 6. Important to the present analysis, the *Royer* court also refused to dispell or disapprove of the *dicta* in *Frost* that a constitutional "stop" occurs as soon as a policeman identifies himself to a citizen on the street. *Id.,* at 1018 n. 8.

The State of Florida in the case at bar and in the decisions noted above is, faced with a judicial impasse in the Third District Court of Appeal, the seat of the nation's most chronic drug traffic. It is plainly evident in the case at bar, that *contrary* to *Terry v. Ohio; Schneckloth v. Bustamonte* and *United States v.*

Mendenhall, the Florida District Court has departed from any correct constitutional analysis under the guise of this court's views in *Reid v. Georgia*. The utter confusion in the controlling opinion in *Royer* as to this Court's opinions in *Reid* and *Mendenhall*, is causing substantial disruption and confusion in the State's prosecution efforts. The Florida District Court's absolute rejection of the facts herein as *not* amounting to consent and to articulable suspicion within the meaning of the Fourth Amendment is utterly erroneous. The failure of the Florida District Court to properly apply this Court's recent decisions in the *Reid* and *Mendenhall* is emblematic of its failure to properly apply *Terry v. Ohio*, in the airport context. At each carefully defined step, from initial observation to investigation, the officers' conduct was completely in compliance with the applicable legal requirements. *See, United States v. Vasquez-Santiago*, 601 F.2d 1069 (2d Cir. 1979). The meshing of practical police considerations and Fourth Amendment theory is achieved through a proper balancing of these competing interests. *Delaware v. Prouse*, ___ U.S. ___, 99 S.Ct. 1391, 1396 (1979); *See also, United States v. Price*, 599 F.2d 494, 500 (2d Cir. 1979); *United States v. Garcia*, 450 F.Supp. 1020 (E.D.N.Y. 1978). Similarly, in *Adams v. Williams*, 407 U.S. 143 (1972), this Court explained:

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an

intermediate response. See id., at 23, 88 S.Ct., at 1881. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. [citations omitted]".

Id., at 145-146.

The Florida District Court under the guise of the Fourth Amendment has abrogated the properly application of the Fourth Amendment explained by both *Terry v. Ohio* and *Adams v. Williams.* The Florida District Court, in applying the Fourth Amendment to the airport context herein, has failed utterly to apply the balancing test under the Fourth Amendment explained by this Court in *Delaware v. Prouse,* and as exemplified in *Mendenhall. See, also, United States v. Williams,* 622 F.2d 80 (5th Cir. 1980), *en banc.* The District Court herein and in the decisions noted above has created a rule of law under the Fourth Amendment, where all any experienced courier need do in Florida, is to reveal all and then complain that he only acted pursuant to a subjective implied coercion. This Court rejected such as analysis in *Schneckloth,* thus:

"It is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right enter or search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against

> *him and then contending that he acted only in response to an implied assertion of unlawful authority.* [Quoting People v. Michael, 45 Cal.2d at 754, 290 P.2d, at 854, Traynor, J.]" [Emphasis added].
>
> 412 U.S. at 230.

Accord, United States v. Gorman, 355 F.2d 151 at 158-159 (2d Cir. 1965). Similarly, with respect to the wholly subjective complaints of the Defendant, *Schneckloth* also held that:

> "[In Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1970)] the court determined that a suspect's wife was not operating as an agent of the State when she handed over her husband's guns and clothing to the police. *We found nothing constitutionally suspect in the subjective forces that impelled the spouse to cooperate with the police.* "Among these are the simple but often powerful convention of openness and honesty, the fear that secretive behavior will intensify suspicion, and uncertainty as to what course is most likely to be helpful to the absent spouse." Id., at 488, 91 S.Ct., at 2049. [Emphasis added].
>
> Id., at 234, n. 15.

Accord, Mendenhall,

In the case at bar, the officers simply responded in good faith to the obvious circumstances, which they observed as trained narcotics investigators. The officers also responded in good faith to the overt manifestations

of consent of the Defendant. The application of the exclusionary rule to the good faith actions of these officers is nonsensical and contrary to any intended purpose under the United States Constitution. *See, United States v. Williams, supra; see also, Stone v. Powell,* 428 U.S. 465, 496-516 (1976) (Burger, J. concurring). Where the exclusionary rule has served its purpose it should not be extended now such that all it serves to do is to frustrate the interdiction of narcotics traffic. *See, Stone v. Powell; Williams, supra.*

VII

CONCLUSION

The officers herein acted in good faith and therefore the cocaine should *not* have been suppressed where its suppression only serves to frustrate the interdiction of chronic narcotics traffic. *See, United States v. Williams, supra.* Illicit narcotics traffic is a insidious cancer eating at the very fabric of our society. It is clear that narcotics traffic presents a clear and present danger to the underlying fabric of this nation. Certainly, illicit narcotics traffic has an embarrassing and substantial impact *when the notoriety of MIAMI as a drug terminal is judicially acknowledged in the Supreme Court of the United States. See,* 100, S.Ct. at 1881 (Powell, Burger and Blackmun, J.J., *concurring*). The "Serbonian Bog" of the exclusionary rule should not be extended to the present circumstances. Cf., *complaint in, United States v. Andrews,* 474 F. Supp. 456 at 462 (D. Colo. 1979). In view of the present circumstances and in view of *Mendenhall* and *Reid,* this Court has jurisdiction and should take jurisdiction over this matter of compelling national importance.

RESPECTFULLY SUBMITTED, on this day of February, 1981, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General

80-1319

Office-Supreme Court, U.S.
FILED
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CLERK

NO.

in the

Supreme Court

of the

United States

October Term, 1980

THE STATE OF FLORIDA,
Petitioner,

vs.

BURR WILLIAM STUART,
Respondent.

On Petition for Writ of Certiorari To the District Court of Appeal of Florida, Third District

APPENDIX TO BRIEF OF PETITIONER ON JURISDICTION

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

SPRING Term, 1978

78-11296

THE STATE OF FLORIDA

vs.

BURR WILLIAM STUART

INFORMATION FOR

I. POSSESSION WITH INTENT TO SELL CONTROLLED SUBSTANCE 893.13 FEL.
II. BATTERY ON A LAW ENFORCEMENT OFFICER
III. RESISTING OFFICER WITH VIOLENCE TO HIS PERSON

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

JANET RENO, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that BURR WILLIAM STUART on the 25th day of JULY, 1978, in the County and State aforesaid, did unlawfully and feloniously possess with the intent to sell, manufacture or deliver a controlled substance, to-wit: COCAINE, in violation of 893.13 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT II

And JANET RENO, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, further information makes that, BURR WILLIAM STUART, on the 25th day of July, 1978, in the County and State aforesaid, did knowingly and unlawfully commit battery upon CHARLES McGEE, a Law Enforcement Officer of the PUBLIC SAFETY DEPARTMENT, while said Law Enforcement Officer was then and there engaged in the lawful performance of his duties, by actually and intentionally touching or striking said person against said person's will, in violation of 784.03 and 784.07 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT III

And JANET RENO, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, further information makes that, BURR WILLIAM STUART, on the 25th day of July, 1978, in the County and State aforesaid, did unlawfully, knowingly, willfully and feloniously restrict, obstruct or oppose CHARLES McGEE and MIGUEL MAGDALENA, duly qualified Police Officers of the PUBLIC SAFETY DEPARTMENT OF DADE COUNTY, FLORIDA, by the said defendant offering or doing violence to the person of said officer when he was then engaged in the lawful execution of a legal duty being performed by him, to-wit: the arrest and detention of said defendant for the crime of POSSESSION OF CONTROLLED SUBSTANCE, said resistance being in violation of 843.01 Florida Statutes,

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

NO. 78-11296

THE STATE OF FLORIDA,

Plaintiff,

vs.

BURR WILLIAM STUART,

Defendant.

Metropolitan Justice Building,
Miami, Florida,
Monday, 3:00 p.m.,
November 13, 1978.

The above-entitled case came on for Motion before The Honorable Herbert Stettin, Circuit Judge, pursuant to notice.

APPEARANCE:

JANET RENO, State Attorney, by
JAMES McMASTER, Assistant State Attorney,
Attorney for Plaintiff.

ENGEL, ARONSON, FRIED & COHN, by
DON C. COHN, ESQ., of counsel,
Attorney for Defendant.

Thereupon:

CHARLES McGEE

was called as a witness on behalf of the State and, having been duly sworn, was examined and testified as follows:

THE COURT: Give us your name, business address and occupation.

THE WITNESS: Charles McGhee, M-c-G-h-e-e. I am a police officer for the Dade County Public Safety Department.

DIRECT EXAMINATION

BY MR. McMASTER [the prosecutor]:

Q How long have you been employed as a police officer?

A Four years.

Q Have you been continuously employed by the Public Safety Department?

A Yes, sir.

Q During those four years, what is your present assignment?

A I am currently assigned to the Airport Narcotics Squad.

Q How long have you had that particular assignment?

A One year. It will be one year this month.

Q Where at?

A The Miami International Airport.

Q What are your duties at the Miami International Airport?

A My duties are to locate narcotic couriers and try to anticipate the couriers and confiscating narcotics.

Q Pursuant to your duties as a narcotic investigator at the airport, have you made previous arrests at the airport?

[Thereupon objections were overruled]

A I would say between thirty and forty.

THE COURT: In the one year?

THE WITNESS: Yes, sir.

Q [By Mr. McMaster] Have you participated in other arrests?

A Yes.

Q Approximately how many additional arrests have you participated in?

A I would estimate twenty to twenty-five.

Q The total is fifty to fifty-five persons?

A Yes.

[Objection overruled]

Q [By Mr. McMaster] Officer, have you received any narcotics training?

A Yes, I have.

Q Where?

A At the Academy. After that, I spent five weeks in the Organized Crime Training School, which included forty hours — that was time devoted to training in narcotics. After that, I spent two weeks with the Drug Enforcement Administration in Broward County.

At that time, it was identification testing for narcotics. I have also spent one week at a narcotics analysis school.

Q Have you received special training for your duties at the airport?

A I received training as far as on-the-job type training through other people on the squad.

Q Do you converse with other members of other airport units?

A Yes.

Q Do you testify in court in any state?

A Yes.

Q Do you testify in other courts?

A Yes. I have testified in the State of California, Colorado and New Jersey. At this time, those are the only states I have testified in for the airport cases.

THE COURT: How about in this state?

THE WITNESS: Yes.

Q [By Mr. McMaster] Were you employed at the airport in your official capacity, as a police officer, on the 25th day of July, 1978?

A Yes, I was.

Q Do you recall what your duty hours were on that date?

A Not specifically.

Q Do you recall if you were working alone or working with someone else?

A I was working with Mike Magdalena.

Q Is this a uniform-type patrol?

A We wear what I am wearing today. We wear a pair of slacks, sport coat and open collar shirt.

Q Did you carry a firearm?

A Yes.

Q Is that exposed?

A No, it is underneath my clothes.

Q Did you have handcuffs?

A I carry handcuffs.

Q Do you carry a police radio?

A No.

Q On the 25th day of July, 1978, did you have occasion to come in contact with a person who later became known as Burr Stuart?

A Yes, I did.

Q Do you see that person today?

A Yes. He is sitting directly to my right in the blue pin stripe suit with a beard.

MR. McMASTER: He is indicating, for the record, the defendant.

Q [By Mr. McMaster] Do you recall approximately what time this was?

A Six-thirty or six-thirty-five.

Q Was this in the evening or the morning?

A Evening.

Q Where were you the first time you observed the defendant?

A I was in the area of Continental Airline in the airport. I had been outside. I came in to converse with Mr. Magdalena, my partner.

Q The two of you were working directly together or in different spots?

A He was working inside. I was working the outside curb at that time.

Q For what purpose were you by the outside curb?

A In that position, I could observe people arriving at the airport. They arrive with their luggage and give it to the outside porter. I would have observation of people at the airport to distinguish any characteristics that would seem unusual to me at that time.

Q At the time you testified you first observed the defendant, what airline were you by?

A Continental.

Q Was there any particular reason you were there?

A There was a flight leaving from Miami. It was going from Miami to Houston. It was one of our prime flights.

Houston is known to be the center of —

MR. COHN: I object.

THE COURT: On what grounds?

MR. COHN: A couple.

THE COURT: This is not coming in for truth but rather to show the reasonableness of his actions surveying people arriving for that flight.

I will not accept it for the truth but for the purpose that Houston is known as a narcotics center.

Q [By Mr. McMaster] At the time you first observed this defendant, where specifically were you located?

A I was located inside the terminal building. It is across from the counter —

Q What drew your attention to this defendant?

A I originally was talking with Officer Magdalena. The conversation — I don't recall.

I was looking towards the door. I observed a taxicab arrive in the front when I was looking out the doors.

When I was looking out the doors, I could see the cab had parked. A second lane is out there. There was another vehicle next to the curb.

That vehicle was obscuring my view. I would observe the top of the vehicle pull up. On the top, it was indicated it was a taxicab. It was a white male sitting in the back seat.

As I was talking with Officer Magdalena, the white male exited the vehicle and proceeded to the curb area.

Q Who was the white male?

A Burr Stuart.

Q The defendant in this case?

A Yes, sir.

Q At the time you first observed him, how far away from him were you?

A Sixty or seventy feet.

Q Were there other persons around?

A There were other people in the vicinity of the terminal. There were none obscuring my view between myself and the door as I remember.

Q What if anything did you do next?

A I continued talking with Officer Magdalena at the time. As Mr. Stuart reached the curb area, I saw he was in possession of a foldover suit bag. It was a leather-type bag you hang suits in.

He stopped on the curb and proceeded a little bit on to the sidewalk past the columns that support the upper level there. At that point, he stopped and he looked into the terminal through the doors. He looked through the glass doors in the direction I was and he turned his head to the left and right and was looking slowly both ways before proceeding.

Q Did he eventually enter the terminal?

A He did. He walked at a rapid pace from there to the terminal through the glass doors and proceeded to the area — it's like a hallway there with shops.

I believe it is the duty-free shops on the side as you come in. He went to the intersection of the hall. At that point, he stopped at that position and turned completely around and looked back towards the door he had come in through and leaning forward from one side to the other out the doors. He then turned back and proceeded towards the Continental counter.

Q Approximately how much time elapsed from the time you first observed him until then?

A A minute.

Q Throughout the entire time were you able to keep him in observation?

A Yes, I was.

Q Did you observe any additional luggage other than the one foldover piece that you mentioned?

A No, I did not.

Q Did you observe him getting out of the taxicab?

A I observed the taxicab pull up and a white male — the view I had of the taxicab, as I said, was partially obscured. The man getting out was Mr. Stuart. It appeared he was getting out of the taxicab.

Q Were you able to observe whether or not he went through any luggage and checked it in outside?

A There were no porters that approached that area of the cab and from that time that he exited — from the time the cab pulled up to he time he exited, there was sufficient time to —

Q Based on your training and experience, what significance if any did you attach to the fact that he was only carrying one bag?

[Objection overruled].

Q [By Mr. McMaster] Answer it.

A I first observed him with the suit bag. The first significant thing I placed on the fact — in fact, he did only have one piece as he entered the terminal. I observed the suit bag.

The suit bag was deflated. It appeared there was nothing in the suit bag at that time.

At that time, I thought it was empty. There were no bulges as far as what I normally see people carrying

in the airport. They have shoes or some kind of shaving kit or clothing.

In the bag, I observed nothing that looked like there was anything in the bag. As far as I was concerned, it was empty at that point.

Q How often do you make observations of the passengers at the airport?

A Daily.

Q How many hours a day?

A I work my job — it is forty hours a week. It is Monday through Friday when I am not in court or writing the reports at the office.

I am at the airport — I would say it is roughly an average of twenty-five hours a week at the airport.

Q During this twenty-five hours, how many passengers would you say you observe?

A Hundreds, hundreds.

Q At the time the defendant approached the particular counter, as you testified, what if anything did you do?

A At the time he approached the ticket counter — well, at that point, he stopped and was looking in the terminal. He proceeded forward again.

There is an area of seats there right across from the ticket counter. He proceeded to that point, slowed

down and looked around and continued on. He never came to a full stop and proceeded up to the ticket counter at Continental.

At the counter, there were a couple of people in line. At that time, either at that time or some time when he came in, I had drawn my attention of what I had seen to Officer Magdalena and we both reflected on what we had seen.

The guy seemed to be over-anxious about people around him and nervous.

Q What did you do when he approached the ticket counter?

A His turn came to approach the ticket counter. On the shelf were some folders with flight dates and paraphernalia which Continental has on the counter. It is provided next to him and he picked up a flight schedule.

I believe it was — I pretended to be interested in reading the flight schedule. My purpose there was to overhear any conversation that might go between the defendant and the ticket agent.

He presented the ticket agent with a ticket at that time. I tried to observe the ticket. The only thing I could see was destination. It was from Miami to Houston. The date showed he arrived on the 24th, which was the day prior, and was leaving back the same date, the following date.

Q You are talking about the 24th and the 25th day of July?

A Yes.

Q What significance did you attach to the date that the ticket reflected, the 24th and 25th day of July?

A The significance was it was a short stay in Miami. The gentleman was dressed in a checkered shirt and dungarees.

Normal passengers leaving through the airport that have a one-day or few-hour stay in Miami are usually here for business purposes.

[Objection overruled].

Q [By Mr. McMaster] When you testified you were next to the defendant, how far away from him were you?

A Within inches.

Q Were you able to overhear any of the conversation between the defendant and the ticket agent or anyone else?

A There was some conversation. As far as I can remember, it was the agent asking him for seating arrangements or something like that. I don't remember the conversation. I made no report.

Q At that time, what happened next?

A At that time, I left the counter. Upon identifying the fact he had been in Miami for one day, I went back to Officer Magdalena and advised him of the same.

Mr. Stuart, during the time he had entered the terminal and the time he was at the counter, was still in possession of the baggage that he had first come into the airport with. He was constantly holding the bag in contrast to people setting bags off to the side. The bag seemed to be very light. Upon him leaving the counter, he never checked the bag.

I don't know if he was requested to with the ticket agent or not, but he did leave the counter with the bag in hand. His actions that we had observed from the time he entered the airport and the fact he had been in Miami for one day —

MR. COHN: I object to what "we observed."

THE COURT: Limit your testimony to what you saw. Officer Magdalena can testify differently.

Q [By Mr. McMaster] Were you able to determine where the defendant went after leaving the ticket counter?

A I followed him. At that point, he left the ticket counter and was going towards concourse G, which is the departure for Continental Airlines.

Q During the time you first observed him up until this time, he headed towards the departure gate. How much time elapsed?

A Maybe three minutes or four minutes. He was in line. I think there were two people in front of him.

It depended upon the time period the passengers in front of him took to get their tickets.

Q During this time, had you made any attempt to approach him?

A No, sir.

Q Had you talked to anyone else?

A Other than the ticket agent, no.

Q What happened next?

A As he reached concourse G, he turned to the right, which would be the entrance to the concourse. I was directly behind him.

Q How far?

A Approximately three feet.

Q Were you with Detective Magdalena at the time?

A He was behind me.

As he proceeded towards the concourse area itself, I was reaching back in my wallet. I hadn't reached back at that point. I was starting.

I was going to pull my badge out and — he looked back at me. He looked over his shoulder and made eye contact with me.

Then walking at a normal pace, at this time, as soon as he made eye contact, he sprinted for about two or three steps. The steps he made were exaggerated compare

THE COURT: Was he still walking or running? Sprinting means running.

THE WITNESS: No, sir. He was still walking.

THE COURT: Speeded up and lengthened the stride?

THE WITNESS: Yes, he did.

At approximately the third step, he turned and made eye contact with me. He was definitely looking towards me. At that point, he started to move on. I had to catch up.

I pulled my wallet out with my badge case. I said, "Excuse me, sir. May I talk to you for a minute."

Before he turned around, I turned sharply to the right and took about five or six steps. I stopped right where I was at. I didn't know what he was doing.

He took five or six steps to the right and stopped and turned around, at which point I walked over to him and displayed my badge. I identified myself as a police officer and asked him — I said, "I would like to talk to you. Would you have any objection?"

He said, "No."

Q [By Mr. McMaster] Hold on.

Before you get to that point, back up to when he turned around and looked at you as he was heading for the departure gate.

A All right.

Q Were there other people in the area?

A Yes, sir. They were waiting for passengers to deplane in that area and also other passengers walking through the terminal area itself.

Q Was there anything about your outward appearance to indicate you were a police officer?

A No.

Q What happened when you approached the defendant at the side?

A I asked him if he had any objection if I talked to him. He said, "No." He said, "What is this all about?"

At that point, Officer Magdalena walked up and I introduced Officer Magdalena as my partner. That way he would recognize who the other gentleman was.

At that time, I advised him — he asked what it was all about. I advised him we worked at the airport as police officers. I told him that our job was to look for things that would seem to be characteristic of people carrying contraband. I told him that our job was to stop people with their consent and our job was to see things that normally wouldn't — to see things that we probably wouldn't pay attention to.

I told him we would like to ask him a few questions. We asked him if he had any objections. He said, "No."

Q Where did all of this take place?

A It was off the main terminal before you enter the concourse. He had moved to the right of the center. It was and close to a wall there.

Q Is this an area that is open to the public?

A Yes, sir. There's a lot of people.

Q There were other people in the area?

A Yes, sir.

Q At the time you approached him, did you ask him to move from that location to another location?

A No, sir. He hadn't moved before he ever turned to see my identification. I proceeded to the point he was.

Q At the time you displayed your badge and ID card, did you pull your weapon or handcuffs or anything?

A No, sir.

Q Did you grab ahold of him?

A No, sir.

Q As best you can recall, do you recall the exact conversation you had with him?

A As best as I can recall, he asked what this whole thing was about. That was the way he expressed it at the time. I explained it in detail.

I had just previously explained we were police officers working at the airport and what we were looking for. We looked for certain characteristics of people carrying contraband. With their consent, we stopped and interviewed them. I asked if he would have any objection to me asking him a few questions. He said, "No."

Q I want you to back up to the ticket counter. You were able to observe the ticket counter?

A Yes.

Q Were you able to determine what flight the defendant was on?

A I was trying to catch it as much as I could, but the agent was handling the ticket.

At one point, I couldn't see the name. I could see the date of the flight, and I believe I remember it was to Houston. I remember it was going to Houston.

Q Were you there specifically because of that Houston flight?

A The flight that leaves at that time.

Q At the time you first observed the defendant in line with the ticket to Houston, how much time was it before the departure time of the plane, if you recall?

A I don't recall. I believe they changed their schedule. I believe it was approximately 7:05. It was around seven o'clock. That is when the plane was to depart.

Q What was the time when you first observed the defendant?

A Six-thirty or six-thirty-five.

Q What happened next?

A At that time after I asked him if he would have any objection to talking to me, he said, "No."

He said, "No" and he handed me the ticket.

Q Did you ask –

A He handed me the ticket. I opened the ticket. I saw B. W. Stuart. At that time either Officer Magdalena – I'm not sure who asked him for identification. Someone asked him for formal identification in the form of a driver's license. He produced – I believe it was a Minnesota driver's license.

I can correct that with my report. He produced a driver's license in the name of Burr William Stuart. The spelling of the last name conflicted.

At that time, I noticed the ticket and the driver's license. I realized that the spelling conflicted. I made these observations. I didn't say anything at the time.

Q How long a period of time did you have the ticket?

A He handed it to me. I was still looking at it – looking at the ticket and the day he arrived prior and the time of departure. He had been in Miami approximately twenty hours.

I said, "Are you down here on business or is it social?"

He said, "It is personal. I came to visit my son."

At that time, I was folding the ticket back up.

Q You did hand it back?

A Yes.

Q Altogether, how long a period of time did you have the ticket and license?

A Less than a minute.

Q What happened after you gave him the ticket back?

A After I gave the ticket back, I asked him what he was doing here. He said that it was personal. He had come to visit his son.

I made a comment that it was a short visit. He said — let me back up.

He said, "I came to visit my son."

I said, "Are you divorced?"

He said, "Yes, I am."

I said, "It was a short visit."

He said, "Well, I came down here and while I was down here, I came to visit my son." Then he said, "He wasn't here, so that's why I'm going back."

The impression he gave me – he had made –

MR. COHN: I will object.

THE COURT: Sustained.

Q [By Mr. McMaster] What significance if any did you attach to the statement the defendant made about that is why he was going back so soon?

MR. COHN: I object. It is speculation.

THE COURT: I will overrule it. It does not come in for truth but the reasonableness of his actions.

A The ticket advised me that he had been in Miami for twenty hours. He stated he came to see his son and was leaving back so early because of the fact his son wasn't home. It wasn't consistent with – the ticket wasn't consistent with the story.

Q How was it not consistent?

A He implied the reason he was going back the day after the arrival in Miami was solely because his son wasn't here. If the ticket was predated, as it was showing a twenty hour layover – to begin with that, it was originally bought with that purpose of twenty hours stay in Miami.

Q During this conversation that you had with the defendant, how would you describe his attitude?

A From the time that we first approached him, he was extremely nervous. His attitude towards us was very cooperative. He was extremely nervous and showing signs of jerkiness all over. His speech became very stuttered and slurred.

We were standing in an air conditioned space and his armpits of his shirt became saturated within a period of a few minutes.

Q What happened next?

A During the conversation when he told me he had been down here to visit his son and the inconsistency of what he was saying with the ticket and things I observed earlier, I asked him if he would have any objection if I checked his luggage.

I advised him that the things that we see — mainly a person coming in Miami and staying a short period of time we had observed him. It was consistent with characteristics of other people we observed at the airport who ran back and forth carrying narcotics.

I asked at that time if he would have any objection if I checked the bag. The bag seemed to be light like he hardly had anything in it.

He said, "Sure" and handed me the bag. He said, "Sure, you can look."

At that time, he handed me the bag. I placed the bag on the floor and I opened the bag. I found inside the bag — I believe a T-shirt and one pair of dungarees. There was no shaving gear or shoes or paraphernalia or such.

Q What happened next?

A At that point, I realized again the inconsistency of what he said. He said he was coming down here to see his son. He only had one change of clothes and no shaving gear.

[Objection overruled]

A [Continuing] It furthered my suspicions of what I had originally observed from his first statement and the items that were in the bag. At that time, I zippered the bag up and returned it to him and he dropped it on the floor.

Q Did you find anything of a contraband nature inside?

A No, sir.

Q What happened next?

A At the time I was opening the bag, I told him I was — I explained that we really appreciated his cooperation. As police officers, we appreciated his cooperation. I told him that we really do respect that and we have a job to do.

Upon returning his bag to him, he dropped it off to the side. I stood up and said, "I'm not trying to hassle

you or anything, but the things I have told you of people's characteristics carrying narcotics is similar to things you have displayed to us." I told him I would iike his consent to pat him down and I asked if he had any objection. At that point, he threw his arms up in the air and with his arms spread, he said, "Sure. I haven't anything to hide. I haven't got anything."

At that point, with his arms up, I patted his torso area, his back, the small of his back, his sides and his stomach area.

Q Why did you concentrate on those areas?

A As an experienced police officer, those are the areas known to me for hiding contraband.

Q What were the results of your patting him down?

A At that point, at the pat down, he was — I found nothing at that point. I bent down and patted down the one leg.

Q Which leg?

A The left leg. As he was facing me, as I finished patting down the left leg, I went to the right leg. As soon as I placed my hand lightly on his thigh and started down, I could feel the muscle in the leg quivering as if it were in spasm.

I approached downward patting each side of his leg with my hand and as I approached downward towards the ankle area his foot actually started jumping off the

floor with muscle spasm causing his foot to make a tapping sound on the floor.

Q Did the defendant say anything at that time?

A Not that I am aware of.

Q What hapepned next?

A Before I reached the foot area — he had boots on. His foot was moving to the right. It was moving away from me. I had to lean forward.

As I leaned forward, when I grabbed — when I patted the boot area and put pressure on it, I felt a lump in the boot.

Q Describe the boot.

A It was a type of Western boot. They are about fifteen to eighteen inches.

THE COURT: The witness is pointing somewhere near the ankle and knee as to the height of the boot.

A [Continuing] The boot would extent halfway up to the calf.

Q [By Mr. McMaster] What type of material was the boot made of?

A Leather type.

Q Had you previously checked the boot on the left leg as you patted it down?

A As I felt it, there was no bulge. I felt the —

Q Where was the bulge located on the boot, on the right foot?

A As I remember, it was on the outside of the right leg.

Q What happened at that time?

A At that time, I felt the bulge. My hand stopped and squeezed the bulgy area. At that time, I squeezed the area. I could hear the sound of plastic. It was a rattling sound.

I can't think of the adjective. The sound of the plastic as I squeezed —

THE COURT: Crinkle?

THE WITNESS: Possibly, yes.

I felt the substance was malleable. It was in a powder form.

Q [By Mr. McMaster] What significance did you attach to the feelings you made with regard to the malleable substance and crinkling?

A My feelings at that time were that the substance he had in his boot, the powder substance — I believed it to be cocaine.

Q Why did you believe it to be cocaine?

A From my past experience in working in the field of narcotics and working at the airport seeing people body carry narcotics and from the exposure I had in the field of police work.

Q What if anything did you do at that time?

A At that time, I was a little off center. Mr. Stuart was extremely nervous. His leg was hopping from the floor like I said.

At that point, I was thinking he would break and run. I immediately stood up and said, "There is a bulge in your boot. What is it?"

He stuttered and said, "That's my money."

I said, "Fine. Would you mind pulling up your pant leg and letting me see?"

He said, "I don't want you looking."

Q What happened next?

A At that point, somewhere in this time span when I stood up and I was talking to him, Officer Magdalena — I don't know if I told him there was a bulge or he realized it from the conversation —

MR. COHN: I object to what Officer Magdalena may have known. I move to strike that.

THE COURT: Sustained.

A [Continuing] Officer Magdalena put his hand like this [indicating] to silence me for a minute. I stopped.

He removed his card and read the Miranda warning card. He read it from the card to Mr. Stuart. He read the warnings per Miranda.

Q Was this done in your presence?

A Yes.

Q Were you able to understand what Officer Magdalena said?

A Yes.

Q Were you able to hear the responses this defendant gave?

A Yes. He responded each time Officer Magdalena asked if he understood. He responded in the affirmative.

THE COURT: Did you or Magdalena say, "You are under arrest."

THE WITNESS: No, sir.

THE COURT: You read him his rights?

THE WITNESS: Yes.

Q [By Mr. McMaster] What happened next?

A At that point, I again advised him I felt what was a bulge in his leg — I told him — I said, "That is not money. I know what money feels like. That is narcotics you got in there."

He said, "No, no. It is my money."

I said, "There are only two things that people carry in boots. That is narcotics or a gun." I said, "That is narcotics."

He didn't say anything. At that point, Mr. Stuart was literally vibrating. He was shaking so hard at that point that the people around us were looking.

There were lockers around the way from the United counter. They are located as you are looking from the terminal door across the terminal. The locker area is by some glass doors and it is a little bit off to the side. It wouldn't draw the attention of a large crowd. We were in group at that time.

We indicated to Mr. Stuart to go over there. With Mr. Stuart between us, I advised Mr. Stuart on the way over that we were detaining him until we could further investigate the bulge in his boot. In fact, I did believe it to be narcotics.

Upon reaching the locker area, there is a wall there. I advised Mr. Stuart to turn around and face the wall. He did.

I asked him to place his hands on the wall. He did. I placed my hands in the back of his belt and tug slightly to step him back. He did again.

I placed my leg between his two legs and told him to spread his legs out, placing him in a spread eagle position. This was against the wall.

At that point, I reached up and started with his arms and worked my way down his arm and to his torso and started a thorough search of his body. Upon reaching the torso area, belt area and checking that, I moved down to his right leg, which is the leg I believe had the narcotics in it. As I proceeded down his leg and as I reached the boot area, I was bent over with both hands going down the leg.

Mr. Stuart flexed his elbows and making his face come closer to the wall, he arched and kicked me in the thigh. I referred to it as a backward horse kick. It threw me off balance, throwing me back. As I went backwards, I was losing my balance.

I grabbed his foot and pulled his foot. I jerked myself upright and took his leg and forced it as high as I could. I forced him into the lockers and said, "You are under arrest." I said, "You are under arrest." I said, "Cool it."

He was trying to fight me. I was trying to get his leg down. I said, "Cool it."

At that point, I started to lower his leg and Officer Magdalena walked over and had been behind me with handcuffs.

MR. COHN: I am going to object to the relevancy as far as the motion to suppress —

THE COURT: This is part of the same sequence of events.

A [Continuing] Officer Magdalena then placed the handcuffs on one arm. At that point, I started to release his foot, placing it back down. Mr. Stuart had seemed to calm down.

At that point, Officer Magdalena got one handcuff on. He broke again trying to run over me and swinging back with his elbows towards Officer Magdalena. He was fighting to break free.

There was a glass door in the direction he was heading. Officer Magdalena grabbed Mr. Stuart by the throat with his arm and held on that way. I had his foot during the meantime. Officer Magdalena had dropped the arm and the handcuff was dangling. He dropped his foot to grab the handcuff because I saw it. I attempted to grab his other arm and bring him forward.

He was fighting both of us, and we were yelling, "Give it up. Give it up."

He made no sound at that time. He physically strained trying to get free of us.

It took both of us to bring him down to the floor, at which time we finally did bring him to the floor. After a period of about a full minute of wrestling, we did finally in fact handcuffed him.

Once we got him handcuffed, I at that time moved to the right boot and removed the boot. I found he was wearing white socks. Inside the socks were rubber bands to the ankle area of the right foot. There was a zip lock plastic bag containing cocaine.

Q Did you make an examination of the substance?

A We did test the substance later at the airport substation, and it proved to be positive to —

MR. COHN: It is hearsay.

THE COURT: Overruled.

Q [By Mr. McMaster] Go back to the point where you moved Mr. Stuart from the one location to the lockers.

A Yes, sir.

Q You started the second pat down of him?

A Yes, sir.

Q What was the purpose of the second pat down?

A At that time, the purpose — I felt I had reason to believe that the substance located in his boot was in fact narcotics, simply cocaine.

At that point, as far as I was concerned, he was no longer free to leave. He was being detained at that point. The purpose of moving him to that location — from his actions, he was so hyper. I thought the guy was going to run or fight. I wanted him out of the area just in case something did in fact happen. I didn't want any civilians to be injured.

Q During this pat down, what were you searching for the second time?

A The narcotics in the boot.

Q This is the second pat down?

A Yes, sir.

Q During the second pat down, did you reach inside the clothing in the upper part of his body?

A No, sir.

Q Has everything that you have testified to taken place in Dade County, Florida?

A Yes.

Q At what point did you first actually remove the narcotics from the boot?

A Once he was on the ground and handcuffed.

Q At the time you testified you pushed him into the locker and told him he was under arrest, what did you tell him he was under arrest for?

A He didn't ask me. He was under arrest for kicking me, battery on a police officer.

Q At what point did you first charge him with possession of narcotics?

A We charged with possession of narcotics after he was under arrest. We removed the — I found the substance to be cocaine.

THE COURT: Is there any cross examination?

MR. COHN: Yes, Your Honor.

CROSS EXAMINATION

BY MR. COHN:

Q Officer, you say it was approximately six-thirty in the evening?

A I believe so, yes, sir.

Q Could you describe to the Court, please, what the population conditions were in the airport at the time you — do you understand my question?

A Usually always except for a period like eleven o'clock at night until maybe four o'clock or five o'clock in the morning there is a period when people are scarce. Most of the time there are are several hundred people in the airport.

Q I am talking about on this particular day, on the 25th of July.

A We had been working at the terminal earlier, and as I remember, there were quite a few people at the airport. Again, when I say quite a few, I mean I would estimate —

Q You did notice other people there and you noticed people walking back and forth in the terminal building?

A Yes.

Q Did you notice other people perhaps turning their head?

A As to have conversations with some other parties, yes.

Q You noticed other people with baggage. Is that correct?

A Yes.

Q What exactly was your purpose, please, in being in the airport at that time, on that particular date?

A My purpose as a police officer was to enforce the laws of the State of Florida. The unit's purpose is specifically to be at the airport to intercept narcotic couriers.

Q That was the purpose for which you were there?

A Yes, sir.

Q As part of your training, did you receive some sort of education as to a drug profile?

A We were educated as far as the narcotics profile that the DEA has.

Q Is that what you use?

A We don't have any profile per se.

Q Are there certain characteristics you look for in certain people?

A There are as to distinguish one person from another. From working at the airport and making cases in narcotics, you can see a similarity of characteristics of people or of — in using one person from a multitude of others.

Q What were the characteristics that drew your attention to Mr. Stuart on that day?

A In my position, we look at everything and take it — sometimes in retrospect — and take it as a whole.

Q Answer the question.

A Yes. The taxicab he arrived by was a minor point. The fact that he did in fact arrive by taxicab would probably indicate that he has no relatives here in Miami or he was down here on business or for some purpose. The fact that he had limited luggage and the fact that the luggage seemed to be extremely light and empty at the time is one.

Q By the way, you did subsequently search the luggage?

A Yes, sir.

Q Was there anything in it?

THE COURT: A T-shirt and pair of dungarees.

Q [By Mr. Cohn] Your assumption of what might have been in the luggage was not correct. Is that accurate?

A I said it appeared to be empty.

Q What other characteristics?

A As displayed by Mr. Stuart?

Q Yes.

A The fact when he from the time he was out of the taxicab — he was looking about him in such a manner to draw attention to himself more so than any normal person at the airport.

Q What exactly did he do?

A He stopped and scanned the area from left to right. He observed everyone around him. He proceeded from a hurried pace and stopped. Again, he scanned the terminal area and quickly turned around. He was constantly scanning and constantly looking at people to draw my attention to him.

Q You say when he entered the airport, he was going at a fast pace?

A As I remember, when he first left the sidewalk coming into the terminal — it is like he was walking at a fast pace.

Q He was not originally walking at a normal pace?

A When I first saw him, it seemed to me he was walking at a much faster pace than when he walked after that until the point he looked back and saw me. As he was entering concourse G —

Q I am talking about when he specifically entered the terminal.

A Yes.

Q About what type of pace was he walking?

A I would say fast.

Q Fast?

A Yes.

Q Do you remember being at the deposition on October 4 of this year?

A Yes, I do.

Q It was approximately 3:20 p.m. I will refer you to page 9 and 10.

Do you remember this question being asked of you?

I asked, "Was there anything unusual about the man who entered the airport?"

Your answer was, "Just as he entered the airport, he walked at a normal — not an exact slow pace — maybe normal or maybe a little expedited. He walked in a few feet, not in the main terminal. It is like a hallway there across from the counters and when he got to that point where he could see the terminal area, he stopped again, and looked around in the terminal area. Then he turned around — turned around, looked

back to the doors where he had just come through and stood there for a few minutes looking back and forth, moving his head from side to side and then he turned around again and proceeded on towards the ticket counter area. It appeared at that time he was looking to see if anyone was coming to follow him —"

Do you remember that question and answer?

MR. McMASTER: I object. It is improper impeachment.

THE COURT: What was the purpose of the impeachment? Was it that he did not walk — it says he walked in at a normal pace. It is impeachment not of a serious point.

MR. COHN: He said when he walked, he was walking in a hurried-like manner into the airport.

Q [By Mr. Cohn] You observed Mr. Stuart getting into the ticket line. Is that correct?

A Yes.

Q Were other people in line?

A As I remember the line, he had two people in front of him.

Q How long did he have to wait? Do you remember?

A Not long. As I testified earlier, it was approximately three or four minutes.

Q Do you know what time this was when he got in the ticket line?

A It would have to be — using the basis of six-thirty and approximately the minute it took him to get to the line, it would be approximately six-thirty-five.

Q The flight left at 7:05 as you are aware.

A As I remember — I don't remember the time. I don't know. My report reflects the departure time.

When we came here today, I didn't get a subpoena. I brought my case file. The exact departure time — I didn't know the case was going —

Q Up until the time Mr. Stuart walked in the airport and up to the ticket agent, did you observe him commit any crime in your presence?

A No.

Q You went up to the ticket counter. Is that correct?

A Yes.

Q You picked up a schedule?

A I believe some kind of piece of paper or magazine.

Q You pretended you were reading the schedule?

A Yes, sir.

Q Did you see or could you see how the ticket was paid for?

A No, sir.

Q You could not?

A No.

Q How long was Mr. Stuart at the counter?

A I would say approximately a minute or a minute and a half. He was there long enough so I could ascertain what I could see off the ticket and return to Officer Magdalena. He was there a normal time a passenger would be there. It was approximately a minute or a minute and a half. It may have been two minutes at the most.

Q Up until the time Mr. Stuart left the ticket line, did you observe anything else unusual other than what you have related here today?

A Just the facts that I have testified to.

Q Anything other than that?

A He was holding the bag and — no.

Q Nothing else unusual?

A He was extremely nervous.

Q He proceeded away from the ticket line. Is that correct?

A Yes.

Q What did you do?

A I followed him.

Q How long did you follow him?

A There is Continental and then Northwestern has a booth next to that. Then there is the concourse itself.

Q Describe to me what his walking pace was at the time.

A Normal, slow, not exaggerated at all. I would say it was normal as far as I was concerned.

Q Up until that point, you had not spoken to him at all?

A No, sir.

Q There came a time when Mr. Stuart stopped.

A Yes, sir. After I said something to him and after he looked back to me.

Q What did you say to him?

A He looked back at me first and proceeded on with elongated steps.

I said, "Excuse me, sir. I would like to ask you a few questions."

I don't think I even finished the sentence. He took an immediate sharp right and walked off five or six steps. I stopped where I was because I didn't know where I was going.

Q Had you identified yourself to him?

A No, sir. As I continued, he turned to the right. I never finished the sentence.

Q Then proceeded to question him?

A After I properly identified myself and asked him if I could talk to him, he said, "Sure."

His next sentence was, "What is this all about?"

Q Up until that point, other than what you related here today, did you observe anything else about Mr. Stuart other than what you related up until this time?

A Yes. The only thing I can remember at that time is that I observed — this hasn't come out in testimony. He was at the counter. I was determining the fact he only been here in Miami one day. He had nothing in his possession as far as my opinion.

He wasn't a business man because he wasn't wearing a suit. He had no sample case, briefcase, or paraphernalia that a salesman or such would have.

Q You did not see him commit a crime up to that point?

A No.

Q What happened then?

A I advised him of what our job was at the airport. We were looking for contraband and if he had any objections to talking to us. He again said, "No."

Q Before proceeding further with him, did you advise him that he did not have to speak to you if he did not want to?

A I advised him it was with consent that we operate. It was with consent that we talk to people. Then I said, "Would you have any objection to talking to us?"

He said, "No."

Q Did you tell him that he did not have to?

A I thought it was self-explanatory.

Q Did you tell him he could go on the plane if he wanted to?

A No, sir.

Q What happened next?

THE COURT: What would have happened if he had said he did not want to talk to you any more and he started to walk away?

THE WITNESS: I would have followed him down to the plane and made sure he got on the plane.

THE COURT: You would not have stopped him?

THE WITNESS: No, sir.

Q [By Mr. Cohn] By the way, you have a particular office down at the airport by the narcotics unit.

A We have a glass enclosed cubbyhole that used to be a rental office. We have a desk in it.

Q Do you have consent forms in that office?

A I don't know what is in that office. That office is located all the way towards Delta Airlines, and it is down the lower level and far away from where we were at.

Q Was Mr. Stuart read his rights at this point?

A No.

Q What happened next?

A He handed me the ticket on his own volition. I didn't ask for it.

I observed the ticket. Somebody asked him for identification. A driver's license was produced and at that time, I compared B. W. Stuart and Burr Stuart and the misspelling. I said nothing. I don't remember if I wrote it down.

I usually write down the name and address. I usually do. I don't know if I did it in that case.

I handed him the ticket and driver's license back and we continued the conversation.

Q You searched his luggage at that time. Is that correct?

A After a little more conversation, I advised him we were in fact looking for narcotics. I advised him that some of the things he had displayed to us were in fact characteristic of people carrying narcotics.

With his consent, he did not have any objection of us searching his luggage — he handed me the bag.

Q He just said, "No. Go ahead and search."

A His exact words, I can't remember. It is probably in the report that I wrote. I wrote the report immediately afterwards.

He indicated that he did not have any objection to me searching his luggage and handed me the bag.

Q How long did you search the luggage?

A A second. It was empty.

Q It was empty? There was no contraband or narcotics?

A None.

Q Did you at that point tell him if he wanted to go on the plane that he could?

A No.

Q Could he if he wanted to?

A Sure.

Q Why is that?

A Because he was free to go. He wasn't being detained.

Q He was not?

A I advised him it was a consent stop when I first approached him.

Q You showed him your badge and identification?

A I identified myself as a police officer. I wanted him to know in fact I wasn't some guy trying to rob him or a Hare Krishna at the airport.

Q What if he attempted to run when you identified yourself as a police officer?

A I would have probably detained him at that time. I would have felt that he would have run because of some reason. If he would have run, I would try to detain him to ascertain that reason.

Q Up to that point there was no reason to?

A He was not detained at that point.

Q What happened next?

A After thanking him for his cooperation, I then told him I wasn't trying to hassle or pick him out. I said that some of the characteristics were found to be with people carrying narcotics. I further advised him one of the forms of concealing narcotics was to body carry such and I asked him at that time if he would have any objection if I just patted him down.

Q You patted him down in the main terminal area?

A As inconspicuously as possible, yes, sir.

Q Officer Magdalena was there at that time?

A He was there. He was involved in conversation with the defendant as —

Q You did not tell him he could leave at that time?

A No, sir.

Q How long did that search take?

A Well, that is the pat down I did at that time. I found the bulge in the right booth and the whole thing took just seconds.

THE COURT: Your purpose at that time in conducting that pat down was to find narcotics. Is that correct?

THE WITNESS: My purpose at that time was to see if in fact he was involved in body carrying narcotics, which I had such advised him.

Q [By Mr. Cohn] That was your total purpose in stopping and frisking him at that point?

A I asked him if he would have any objection if I patted him down.

Q What was the result again, please, of the pat down?

A As I got to his right leg, the nervousness — the spasm in his leg, the moving in his leg and the tapping of the foot — it was obviously muscle spasm or anxiety. Anyway, as I would squeeze the bulge with my hand, I could hear the crinkling sound of the plastic and feel the malleability of the substance, which I believed to be cocaine at that time.

Q It was after that you ordered him over to the locker?

A At that point, I stood up and asked him, "There is a bulge in your boot. What is it?"

He blurted that it was his money. I said, "Fine. Just pull up your pant leg and let me see."

Q Was it consistent with it being money?

A No, sir.

Q Why not?

A The bulge was malleable. Personally, at the airport, I have asked to see money that was strapped in their boot and the consistency of money is not the same consistency, not the same malleability, as cocaine.

Q Did he refuse to be patted down?

A I said, "Pull your pant leg up and let me see it."

He said, "I don't want you looking."

That is why I am being vague. I can't remember at which point it was. I don't know whether it was right after that or prior to me asking him to pull his pant leg up that Officer Magdalena stopped me long enough to read the Miranda rights to Mr. Stuart.

Q What was your purpose in ordering him over to the locker? What did you want to do when you were over there?

A Search him.

Q Search him?

A Yes.

Q That was for narcotics?

A Yes, sir.

Q When you got over there, that is when you conducted a pat down?

A We called it a search. We made him spread eagle and searched him.

Q Did you fear for your safety when you searched him against the –

A For safety of others and ourselves. He was hyper. He was sweating profusely. He couldn't stand still.

When we started, I thought the guy would hit or kick us. I was trying to be braced for whatever came up. That is why we moved him as far as we did.

Q The fear of safety that you are talking about was not fear for what was inside the boot?

A No, sir. I thought it was narcotics.

Q What happened after you got over to the locker?

A I advised him to spread eagle against the wall, which he did. He took the stance and I took started to do a more thorough search. I did not reach inside of his clothing. The only time I reached inside was for the belt. I reached for the bag and tugged at his bag a little bit rather than patting it down. I rubbed the body to ascertain the fact if there was any contraband on the upper torso that I might have missed during the pat down.

As I proceeded down and as I was reaching the right boot area with my hand, he flexed forward and I knew it was coming. I started to stand up. I tried to back up and he horse-kicked me in the right thigh.

Q The struggle ensued after that?

A Yes, sir.

Q By the way, did you have any sort of tip or anything as to Mr. Stuart?

A No, sir. I never saw him before in my life.

Q You know what I mean by tip?

A No.

Q No information from an informant or other sources that he would be coming in or anything?

A No.

Q When you finally got the boot off, where was Mr. Stuart?

A On the floor.

Q Face down?

A I believe so.

Q He was handcuffed?

A Yes.

Q You placed him under arrest at that time?

A Yes. He was under arrest as soon as he kicked me.

Q Was Mr. Stuart ever, during this whole incident, told if he wanted to, I am talking about prior to the time he spread eagle against the wall, he could leave?

A No, sir.

Q He was not?

A No.

MR. COHN: I have no further questions.

THE COURT: Is there any redirect?

MR. McMASTER: Yes.

REDIRECT EXAMINATION

BY MR. McMASTER:

Q Detective, you testified you stopped and arrested a number of different people at the airport. The Judge asked you what would happen if he said that he wanted to get on the plane.

In your experience, has a person indicated to you that he did not want to speak to you?

A Numerous times.

Q Have you in fact let him go to the airplane at that point?

A Yes, sir.

MR. McMASTER: I have no further questions.

THE COURT: Is there any recross?

Does the State have any other testimony?

[Witness Excused]

MR. McMASTER: We have another officer. I believe his testmony would be cumulative.

THE COURT: Can you stipulate his testimony would be cumulative?

MR. COHN: That is correct.

MR. McMASTER: I will proffer the deposition for the record.

THE COURT: Is there any objection to the deposition of Officer Magdalena being received as State's Exhibit 1?

MR. COHN: No.

THE COURT: Is there any other testimony?

MR. McMASTER: Nothing further.

[The deposition of Officer Magdalena was marked State's Exhibit No. 1 and received in evidence.]

THE COURT: We will take a three-minute plea. We will be in recess.

[Thereupon, a recess was taken.]

MR. COHN: I will call the defendant.

MR. McMASTER: The State requests the officer to remain here.

THE COURT: You intend to call them on rebuttal?

Send him out. If he is not going to testify, he can stay like anyone else.

Thereupon:

[The defendant herein, was called as a witness and, having been duly sworn, was examined and testified].

[Thereupon Officer McGhee was called to testify in rebuttal].

[Thereupon] MR. McMASTER: I have nothing further.

MR. COHN: I have nothing.

THE COURT: Thank you, Officer.

Do you both rest?

MR. McMASTER: Yes.

MR. COHN: Yes, Your Honor.

THE COURT: Mr. McMaster, do you concede the search and seizure was based on the consent of the defendant?

MR. McMASTER: Partially.

THE COURT: Do you want to make a record on the first portion, that is the characteristics of the defendant was such that reasonable suspicion was engendered in the mind of the officer authorizing them to temporarily stop and detain and conduct some preliminary —

MR. McMASTER: I believe you have gone through this once before in the past. The State is not going to concede that the first contact between the officer and the defendant was in fact a stop. It has been the State's position all along and still is that the initial contact between the police officer and the defendant is in fact

voluntary conversation. It only amounts to a stop when a person has been accosted.

THE COURT: We do not agree. They have a right to do that to any citizen just as a private citizen has a right to walk up to a stranger and try to talk to them.

It is from that point forward you say there is consent, consent of the defendant. That is what makes him guilty.

MR. McMASTER: Partially.

THE COURT: In what way is something more than consent that would allow the officer to do more than just walk up to him and talk to him?

MR. McMASTER: Nothing more than that, Judge.

THE COURT: What is the basis for your argument that the motion to suppress should be denied?

MR. McMASTER: The first argument the State has —

THE COURT: I am not impressed. I will say it again for the record that the defendant gets out of a cab at a busy airport with a flight ticket to Houston, which you believe is a center for narcotics, and he is nervous. That in and of itself is not sufficient for walking up, stopping him and at that time detaining him and searching him. You would lose flat out.

MR. McMASTER: I understand Your Honor's position.

THE COURT: The things I am interested in are what beyond consent would justify what happened in this case.

MR. McMASTER: First of all, the State's position is the pat down, which according to the officer's testimony, revealed a bulge in the side of the boot. It was obtained as a result of the consent.

THE COURT: Agreed.

I have not asked you besides consent what gives it —

MR. McMASTER: Besides consent, we never got to the actual search. He revoked his consent. He said, "I don't want you looking in the boot."

THE COURT: At that point, you would say articulable suspicion was further —

MR. McMASTER: I believe the officer's testimony was in fact at that point, the man was detained. The officer felt the bulge or plastic or felt the malleable substance and felt the plastic wrinkling made. A number of arrests are based on the training and experience of —

THE COURT Let us assume all of that is true. The defendent revoked whatever consent he had given up until that time. The officer reached the boot area and —

MR. McMASTER: We will rely on two different theories for the search. The first one being that at the point where the officer felt what he felt and under the circumstances, the State contends he had probable cause to believe there was narcotics there because of the pat down and because of the softness of the material. What he had felt, the wrinkling and the answers given by the defendant in relation to the answers to the officer's question — the return trip to Houston aroused suspicion. I believe at that point, the officer had probable cause to believe the narcotics were there and was justified in detaining him on those grounds. The basis for the seizure there was exigent circumstances. The man testified already that he was going to get on an airplane in fifteen minutes.

THE COURT: That is reason for articulable suspicion?

MR. McMASTER: It is probable cause for search. Articulable suspicion is going to justify a stop.

THE COURT: Once you have justified the stop and you feel this malleable substance which crinkled, that exigent circumstances allow you to search him further rather than stopping him and getting a warrant or allowing him to continue on his journey and hopefully telegraphing ahead so they can meet him —

MR. McMASTER: That is my first argument.

My second argument is not only that the officer had the probable cause, plus exigent circumstances, but under these particular circumstances where a man at the airport is about to board a plane, it never got to

the point where they seized the narcotics as a result of that. The officer testified that while they were in the process of that, the defendant —

THE COURT: That is why I have to make a fact-finding as to who I believe.

MR. McMASTER: There are a number of —

THE COURT: The defendant says they jerked his legs out from under him.

MR. McMASTER: That is correct. It is the State's contension the seizure was made by a valid arrest of battery to a police officer. He knew, the defendant testified, they were police officers. There is no dispute that the testimony of the officer would be buttressed by the deposition of the second officer, and, in fact, the defendant did kick when the officer started to get down towards that boot. While they were by the locker and the officer was struck — he was struck. It was without consent.

THE COURT: I understand. You are arguing the crime was committed and he had the right to arrest and —

MR. McMASTER: Those are the two grounds the State alleges.

MR. COHN: I am familiar with the law in this field. I want to point out the case of United States versus Floyd. Are you familiar with it or not? I want to quote from Page 730. The cite is 418 Fed. Suppl. 730. (1976).

The Court said, "The Court finds that the bulges which Agent Marconi felt, coupled with the allegedly evasive action of Mr. Floyd still do not add sufficiently to the profile characteristics to furnish probable cause for the defendant Rosenborough's arrest and search."

THE COURT: Somehow they do not do well in court up there.

[Emphasis added].

MR. McMASTER There seems to be a split of –

MR. COHN: We have another argument, Judge.

MR. McMASTER: Off the record.

[Discussion off the record]

MR. COHN: We are not conceding the fact that it was a valid arrest. Our position is basically the poisonous tree type argument.

THE COURT: To do that, I have to make a couple of fact-findings in your favor. One, he did not give them consent to search. He did not give them permission to search his person. He did not willingly accompany them and he was forcefully thrown to the ground and then the narcotics were removed.

If I accept the State's factual predicate that he allowed them to search the bag and he willingly agreed to be patted down and displayed nervousness and thereafter in their discretion because they were afraid for their safety and other civilian's safety, they moved

him to a quiet area while they were trying to —

MR. COHN: Assuming for the sake of argument that you will accept the State's position, there are also cases cited in my motion to suppress that hold in that type of situation any consent that follows is not voluntary, not knowingly.

THE COURT: Consent that followed what?

MR. COHN: Any alleged consent that follows a stop and that follows a stop of this nature.

THE COURT: Anybody can knowingly waive his rights. You have to make a determination whether he knew his rights or —

MR. COHN: I do not know if the case will go that far. Once again, I cited them in the motion. The way I read them is that no consent —

THE COURT: No consent is valid.

MR. COHN: The burden is very heavy upon the State and the fact that they necessarily come here — they are saying one thing. The defense is saying another.

In that particular type of situation, the burden is not met in all those cases.

MR. McMASTER: I will make one argument on the fact. It will be very brief.

The defendant testified on cross examination like the officer did except about the cab arriving. The officer

asked him permission to search the bag. At that point, he said, "No." The officer went about thirty seconds later and searched it.

At any rate, then he said the officer asked him again to search his body. I submit to the Court that the testimony is absolutely ridiculous. The officers are going to unlawfully, as the defendant contends, search the bag? They are not going to turn around and search his body when he has already denied them permission to look through the bag.

I submit, Judge, that the testimony of the defendant is certainly tainted by the fact he knows he is on trial and any testimony has got to be beneficial to him.

THE COURT: I understand. I really think it is a factual finding. I am going to have to make a factual finding.

I find the initial stop would not be justified under any profile. The initial stop in conversation in fact is justified based on the rights of a police officer to stop and talk to anybody he wishes.

They are not obligated to talk to them. In my mind, the more credible evidence supports that the initial conversation with the defendant was in fact one where the defendant consented to talk to the officers. Thereafter, consent to allow them to go through his luggage and to search him — I am not convinced that it is true for the purpose of this hearing. I find it to be more credible that the defendant is carrying a considerable amount of cocaine in his boot. I find it hard to believe he would not be nervous. I think the officer's testimony

concerning the agitated state of the defendant sounds more credible under the circumstances.

I have not finished. I will give you a chance. I find it to be more credible when they began to search him they were unable to get to his boot. At that point, they moved him off to the side. I accept the version of the evidence that says when they got to search him again and they had a right to at that time because there was suspicion which arose justifiably. At that point, when they began to search him and the struggle ensued, it was the defendant who began the fracas and caused the fight.

THE COURT: That is the way I feel, sir.

MR. COHN: Judge, the question is how the suspicion was aroused.

THE COURT: He consented to the bag and became agitated and nervous. When they searched his body, he became more agitated and —

MR. COHN: Why was their suspicion aroused?

THE COURT: From that point, it is downhill. Up to that time, it is downhill. They had no right to search merely because he was within the characteristics of the DEA profile.

MR. COHN: I do not think the State has met its burden.

THE COURT: Mr. Cohn, I do. I feel that the State has shown a consent. It is not true in all cases,

but it more believable in this case. Somebody has to make a decision on who to believe.

MR. COHN: Why burden the defendant with this appeal?

THE COURT: The State pays me a lot of money to make decisions. It does not mean it is in favor of the State but I have to.

I will find in favor of the State. I will deny the motion to suppress.

[Thereupon the proceedings subsequently concluded at 6:00 o'clock p.m.].

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

EXCERPT OF PROCEEDINGS OF January 9, 1979.

BEFORE THE HONORABLE JUDGE HERBERT STETTIN.

No. 78-11296

STATE OF FLORIDA

vs.

BURR WILLIAM STUART

POSSESSION WITH INTENT TO SELL CONTROLLED SUBSTANCE
BATTERY ON A LAW ENFORCEMENT OFFICER
RESISTING OFFICER WITH VIOLENCE TO HIS PERSON

Assistant State Attorney Gertrude Novicki

Counsel for the Defendant Don A. Cohn

Court Reporter Jeanell Anderson

The Defendant withdrew his prior plea and pleaded nolo contendere to Count One and Two of the Information.

The State abandoned Count Three of the Information.

The Court found the Defendant guilty of Count One and Two of the Information.

The Court Set Supersedeas Bond for the Defendant in the amount of Two Thousand and no/100 Dollars ($2,000.00).

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1980

CASE NO. 79-100

BURR W. STUART,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Opinion filed September 30, 1980.

An Appeal from the Circuit Court for Dade County, Herbert Stettin, Judge.

Engel, Aronson, Fried & Cohn and Don S. Cohn, for appellant.

Jim Smith, Attorney General and Calvin L. Fox, Assistant Atttorney General, for appellee.

Before BARKDULL*, HENDRY and NESBITT, JJ.

PER CURIAM.

The appellant's judgment of conviction is reversed with directions to discharge him from custody. Because

*Charles Carroll, (Ret.), Associate Judge, participated in the oral argument but not in the decision.

of the reasons and authorities stated in *Royer v. State*, _____ So. _____ 2d (Fla. 3d DCA 1980) (Case No. 78-1050, opinion filed September 9, 1980) (en banc) and *State v. Frost*, 374 So. 2d 593 (Fla. 3d DCA 1979), we find the trial court erroneously denied appellant's motion to suppress the physical evidence.

Reversed with directions.

MOTION FOR REHEARING EN BANC AND MOTION FOR CERTIFICATION

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA,

THIRD DISTRICT

CASE NO. 79-100

BURR STUART,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

COMES NOW, the Appellee, THE STATE OF FLORIDA, by and through its undersigned counsel, pursuant to Rule 9.300 of the Florida Rules of Appellate Procedure (1978) and submits this Motion for Rehearing en banc and Motion for Certification of a Question of Great Public Interest and as grounds therefore shows:

1. That on September 30, 1980, this Honorable Court issued its decision herein reversing the trial court's denial of the Defendant's Motion to Suppress, citing the pending *en banc* decision in *Royer v. State*, D.Ct. Case No. 78-1050, opinion filed September 9, 1980.

2. That this Court has overlooked the fact that the facts in the case at bar bear no relationship whatsoever to those in, *Royer v. State*, and *Royer* is on its face *confined* to its peculiar facts. *See, Slip opinion*, at pp. 2

(court opinion) and pp. 11-21 (Hubbart, J., *concurring*). This court's opinion of 'reversed, *see Royer*,' must necessarily be incorrect. Unlike *Royer* in the case at bar, the trial court *specially* found that it must upon the record *make findings of fact as to who to believe.* T96. The trial court found that the initial stop herein was nothing more than a voluntary contact between a citizen on the street and police officers in a position that they had a right to be. T100. The court held *that the more credible testimony reveals that the Appellant consented to the initial conversation; that the pat down, which revealed the bulge in the Appellant's foot was pursuant to the Appellant's voluntary consent; that the more credible evidence revealed that the Appellant was highly agitated and his behavior was unusual and that the substance in his boot was in fact contraband narcoitcs — cocaine. See,* T100-T101. *The court below further found as a matter of fact that after the bulge was discovered the Appellant began "the fracas and caused the fight."* T101. These questions of fact should *not* be disturbed by this court. *See, State v. Battleman,* 374 So.2d 636 (Fla. 3d DCA 1979); *see, also State v. Nova,* 361 So.2d 411, at 412-413 (Fla. 1978).

Further, *Royer* does not involve a battery upon a police officer and subsequent arrest. The cocaine from the Defendant's boot, the trial court factually found, was lawfully recovered from the Appellant's person, pursuant to his arrest for battering a police officer. T34; *see, Brant v. State,* 349 So.2d 674 (Fla. 3d DCA 1977); §901.21 Fla.Stat. (1977). The Appellant had no right to resist an arrest with violence whether lawful or not. *See, Lowery v. State,* 356 So.2d 1325 (Fla. 4th DCA 1978); *Kaiser v. State,* 328 So.2d 570 (Fla. 3d DCA 1976); *State v. Byrne,* 311 So.2d 764 (Fla. 4th DCA

1975); *Clarke v. State*, 303 So.2d 35 (Fla. 3d DCA 1974); *Canney v. State*, 298 So.2d 495 (Fla. 2d DCA 1973); *Rosenberg v. State*, 264 So.2d 68 (Fla. 4th DCA 1972); §776.051 Fla.Stat. (1975).

3. Further, this court has overlooked the fact that *Royer* does not dispute any question of contact or consent in the airport context. *See*, Hubbart, J. *concurring*. Clearly, there may be consent after even a primary illegality and the Defendant was repeatedly warned of his right to refuse consent herein. *See, Husted v. State*, 370 So.2d 853 (Fla. 3d DCA 1979). This court has manifestly erred in failing to reach the decisive factor below, that the trial court affirmatively found that the transaction was *pursuant to the Defendant's voluntary consent. See, Husted v. State; Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). This court should not reverse the trial court herein based upon *obiter dicta* in *Royer. See, Royer v. State*, at pp. 11-12 (Hubbart, J., *concurring*). The trial court's ruling upon an issue of consent should *not* be disturbed where in the case at bar, substantial competent evidence, *which the trial court chose to believe*, supports the trial court's view. *See, e.g., United States v. Fike*, 449 F.2d 191 (5th Cir. 1971); *Bretti v. Wainwright*, 439 F.2d 1042 (5th Cir. 1971), *cert.den.*, 404 U.S. 943, 92 S.Ct. 943, 30 L.Ed.2d 257 (1971); *State v. Nova; Husted v. State, State v. Battleman, supra.*

4. That in the holding of the *Royer* court, the court acknowledges that the opinion of the United States Supreme Court in *United States v. Mendenhall*, _____ U.S. _____, 100 S.Ct. 1870 (1980), is contrary to the facial holding of the *Royer* court. Slip opinion, at p. 8, line 5; p.4, n. 6. Furthermore, the concurring opinions

of two (2) members of this Court specially rejected the *obiter dicta* of the *Royer* court opinion and four (4) respected members of this Court did not participate in the *en banc* rehearing. Indeed, the State submits that *Royer* is erroneous in the face of *Mendenhall*, 100 S.Ct. at 1877-1879, and *Reid v. Georgia*, ___ U.S. ___, 100 S.Ct. 2752 (1980). Contrary to the *Royer* court's view, *Reid* did *not* categorically reject all so called "profile' transactions. *See also, Slip opinion* at pp. 11-21 (Hubbart, J. concurring). In *Reid v. Georgia*, the holding of the court is confined to the premise that *IF THE JUDGMENT OF THE COURT IS TO BE PREDICATED UPON TERRY A "STOP" UPON THE FACTS STATED BY THE GEORGIA APPELLATE COURT, THE "STOP" WAS NOT LAWFUL.* This proper analysis of *Reid* is found upon the *face* of the *Reid* opinion, thus:

> "[Holding]: The Appellate court's conclusion in this case that the DEA agent reasonably suspected the petitioner of wrongdoing rested on the fact that the petitioner appeared to the agent to fit the so-called "drug courier profile" a somewhat informal complilation of characteristics believed to be typical of persons unlawfully carrying narcotics. Specifically, the corut thought it relevant that (1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were travelling together, and (4) they apparently had no luggage other thatn their shoulder bags.

"We conclude that the agent could not as a matter of law, have reasonalby suspected the petitioner of criminal activity *on the basis of these observed circumstances.* Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct.

"FOR THESE REASONS, THE JUDGMENT OF THE APPELLATE COURT CANNOT BE SUSTAINED INSOFAR AS IT RESTS ON THE DETERMINATION THAT THE DEA AGENT LAWFULLY SEIZED THE PETITIONER WHEN HE APPROACHED HIM OUTSIDE THE AIRLINE TERMINAL. Accordingly, the judgment of the Georgia Court of Appeals is vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion."

100 S.Ct. at 2753-2754.

It is quite clear that *Reid* simply states that 'if this is considered to be a 'stop' it is not lawful.' THE UNITED STATES SUPREME COURT NEVER REACHED THE ISSUES OF *CONSENT* OR *CONTACT* upon the facts in *Reid.* See, 100 S.Ct. 2754-2755 (Powell, Burger and Blackmun, J.J. *concurring*).

A proper analysis of *Reid* thus centers upon the fact that the Court did not reverse the Georgia appellate court, but *REMANDED FOR FURTHER CONSIDERATION.* How this is essential to a *proper* evaluation of *Reid* centers upon the fact that the *Georgia appellate*

court rested its holding upon two (2) distinct alternative grounds, numbered "1" and "2". *See, State v. Reid*, 149 Ga.App. 685, 255 S.E.2d 71 (1979), *cert. den.* June 20, 1979. The Georgia appellate court, *noting that South Florida is a notorious drug traffick terminal*, first of all, held that the facts as developed from the drug courier porfile *were articulable suspicion*, but relevant to the immediate discussion also held that:

> "2. In its ruling on the motion, the trial court found "*that at the time the officer suggested these men go back into the airport with him that by that time they were quote under arrest end quote.*" The only evidence heard by the trial court was that given by the agent of the Drug Enforcement Administration who testified that the defendant and his companion consented to return to the terminal. *The Agent was not dressed in a uniform, although he did produce his credentials.* He was wearing blue jeans and a light weight jacket. He had a gun in the rear area of his waistband, covered by his jacket, *and not visible to the defendant and his companion.* He was alone. There is no suggestion that the defendant was ruluctant to return to the terminal. *There is also no evidence of coercion, youth, lack of education, low intelligence, harsh questioning, or use of physical force.* State v. Rivers, 142 Ga.App. 96, 235 S.E.2d 383 (1977). Whether consent was given is to be determined form the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). At the conclusion of the state's evidence on the motion, both sides when questioned by

> the trial judge, indicated they had nothing further to present. The evidence of consent is unrebutted. Therefore, we hold that the trial court erred in finding that the defendant was under arrest." (emphasis added).
>
> 255 S.E.2d at 72-73.

The United States Supreme Court left the foregoing alternative holding in the Georgia appellate court, intact even though the transaction may have begun with a "profile." The undersigned has conferred with the Attorney General's Office and the prosecutor in *Reid* and would indicate to this Honorable Court that the matter would be returning to the United States Supreme Court upon the contact/consent issue after remand and consideration by the Georgia appellate court.

5. Indeed, the Appellee submits that *Mendenhall* and *Reid* are entirely consistent with each other and contrary to the *Royer* court's opinion herein. *See, also, Slip opinion*, at pp. 11-22 (Hubbart, J. *concurring*). This Court's opinion has overlooked the fact that the *Royer panel* properly refused to substitute its judgment for that of the trial court where the evidence, *clearly supports a finding of free and voluntary consent. See, Husted v. State*, 370 So.2d 853 (Fla. 3d DCA 1979); compare, *State v. Battleman*, 374 So.2d 636 (Fla. 3d DCA 1979). *With respect to search and seizure, there is no difference between Florida law and the Florida Constitution and the United States Constitution. See, Hetland v. State*, 366 So.2d 831 (Fla. 2d DCA 1979), *approved and adopted, Hetland v. State*, ____ So.2d ____ (Fla. 1980), S.Ct. Case No. 56,245, opinion filed September 11, 1980. This Court has overlooked the fact that the views of the *Mendenhall*

court are therefore, *binding* upon this Court. Most respectfully, the state submits that under *Mendenhall*, this Court should *not* substitute its judgment for that of the trial court.

6. This Court has overlooked the fact that these officers had a duty to act and were *undisputably acting in good faith.* The exclusion of the evidence herein as this Court has stated it, in its opinion, would serve no purpose except to frustrate the interdiction of narcotics traffic. *See, United States v. Williams,* 622 F.2d 830 (5th Cir. 1980) *en banc, cf., also, slip opinion,* at pp. 14-21 (Hubbart, J. *concurring,* urging balancing of the *substantial* competing interests herein).

7. The issue herein as to the constitutional balance that should be struck in the airport context herein is of major and compelling statewide importance in Florida. The Florida Supreme Court has a related issue in an airport case pending before it in *Shapiro v. State,* Fla. S.Ct. Case No. 54,097. In view of the circumstances of this Court's opinion, and in view of *Mendenhall* and *Reid,* this Honorable Court should certify the precise questions of law and fact herein as ones of great public importance.

8. That in view of the intervening decisions of the United States Supreme Court in *Mendenhall* and *Reid* this Court should grant rehearing *en banc* before a full court. The Appellee would submit that to the extent possible, *all members of the Court* should sit on the second rehearing *en banc.*

WHEREFORE, upon the foregoing, the Appellee, THE STATE OF FLORIDA, prays that this Honorable

Court will grant rehearing en banc and upon rehearing will affirm the trial court upon any of the diverse alternative grouds argued by the Appellee in its brief and/or that this Honorable Court will certify to the Florida Supreme Court the issues of law and fact herein as matters of great public importance.

RESPECTFULLY SUBMITTED, on this 15th day of October, 1980, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

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(305) 377-5441

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1980

WEDNESDAY, NOVEMBER 5, 1980

CASE NO. 79-100

BURR STUART,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Counsel for appellee having filed in this cause motion for rehearing, and same having been considered by the court which determined the cause, it is ordered that said motion be and it is hereby denied.

A True Copy
ATTEST:

[Illigible]
Clerk District Court of
Appeal, Third District

cc: Calvin L. Fox
Don S. Cohn

DADE COUNTY PUBLIC SAFETY DEPARTMENT
ORGANIZED CRIME BUREAU

AIRPORT NARCOTIC UNIT
STATISTICAL REPORT

During the period from October 1, 1977 through May 31, 1979, the Unit's investigations have resulted in the following:

1.	Investigations Initiated:	512
2.	Narcotic Couriers Identified:	386
3.	Narcotic Couriers Arrested:	298
4.	Narcotic Shipments Intercepted:	48

Contraband Seized

DRUG	AMOUNT
Heroin	24 Pounds
Cocaine	430 Pounds
Marijuana	15,000 Pounds
Methaqualone (Quaalude)	30 Pounds

IN THE SUPREME COURT OF FLORIDA

CASE NO. 60,002

STATE OF FLORIDA,

Petitioner,

vs.

BURR W. STUART,

Respondent.

AMENDMENT TO AND RENEWED SUGGESTION OF DISMISSAL

COMES NOW, the Petitioner, THE STATE OF FLORIDA, by and through its undersigned counsel and submits this Amendment to and Renewed Suggestion of Dismissal, to wit:

1. That on December 30, 1980, the Petitioner submitted its Suggestion of Dismissal, alleging that because of a *per curiam* opinion *without discussion* in the case at bar, the Third District Court of Appeal herein was the Petitioner's state court of last resort. *St. Paul Title Insurance Co. v. Davis*, _ So.2d _ (Fla. 1980) Fla. S.Ct. Case No. 59,245, opinion filed November 13, 1980; *Dodi Publishing Company v. Editorial America S.A.*, 385 So.2d 1369 (Fla. 1980); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980).

2. That under Rule 20.1 of the rules of the United States Supreme Court, the Petitioner has sixty (60)

days from the final denial of rehearing in the Third District Court of Appeal in which to seek review in the United States Supreme Court. *See, Nash v. Florida Industrial Commission*, 389 U.S. 235, 237 at n.1, 88 S.Ct. 362, 19 L.Ed.2d 438 (1967). The Petitioner in good faith, simultaneous with the submission of its Suggestion of Dismissal herein, applied for an extension in the United States Supreme Court, in which to submit its Petition for Certiorari. Justice Powell has granted the Petitioner's request for an extension of time. *Petitioner's Composite Exhibit*, attached hereto.

3. That on January 9, 1981, this Honorable Court deferred ruling upon the Petitioner's Suggestion of Dismissal and permitted the Petitioner additional time in which to serve its brief. The Petitioner is most desirous of proceeding in this Court and would not wilfully disobey any order of this Court. The difficulty encountered herein is that the time for filing the Petitioner's appeal in the United States Supreme Court runs from the final decision of the State Court of highest resort. *See*, U.S. Sup.Ct.R. 20.1; *Nash v. Florida Industrial Commission*, 389 U.S. at 237 n.1. This Court has made it abundantly clear that it has no jurisdiction in and will not entertain, petitions for review or any other application from *per curiam opinions* without discussion, such as that in the case at bar. *Dodi Publishing v. Editorial America; Jenkins v. State; St. Paul Title v. Davis, supra.* Under these cases it would seem to be futile to proceed herein as a matter of law *and* at the same time the Petitioner's only viable avenue of review in the United States Supreme Court will have also expired.

WHEREFORE, the Petitioner, THE STATE OF FLORIDA, "suggests" to this Court that the Petitioner's Notice of Discretionary Review was inadvertently filed and dismissal herein may be appropriate in view of the foregoing opinions of this Court. Alternatively, in the event that dismissal as a matter of law is not appropriate, the Petitioner with leave of this Honorable Court will file its brief within five (5) days of the order of this Court.

RESPECTFULLY SUBMITTED, on this 20th day of January, 1981, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

/s/ Calvin L. Fox

CALVIN L. FOX, Esquire
Assistant Attorney General
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Miami, Florida 33128
(305) 377-5441

[RECEIVED JAN 26 1981]

IN THE SUPREME COURT OF FLORIDA

FRIDAY, JANUARY 23, 1981

CASE NO. 60,002

District Court of Appeal
3rd District — Case No. 79-100

STATE OF FLORIDA,

Petitioner,

vs.

BURR W. STUART,

Respondent.

Upon consideration of the Amendment to and Renewed suggestion of dismissal, said amendment and suggestion is hereby granted and the Petition for Review is hereby dismissed.

A True Copy
TEST:

/s/ Sid J. White
Sid J. White
Clerk
Supreme Court

ner
CC: Hon. Louis J. Spallone, Clerk
Hon. Richard P. Brinker, Clerk
Hon. Herbert Stettin, Judge

Calvin L. Fox, Esquire
Don S. Cohn, Esquire
ENGEL, ARONSON &
FRIED, P.A.